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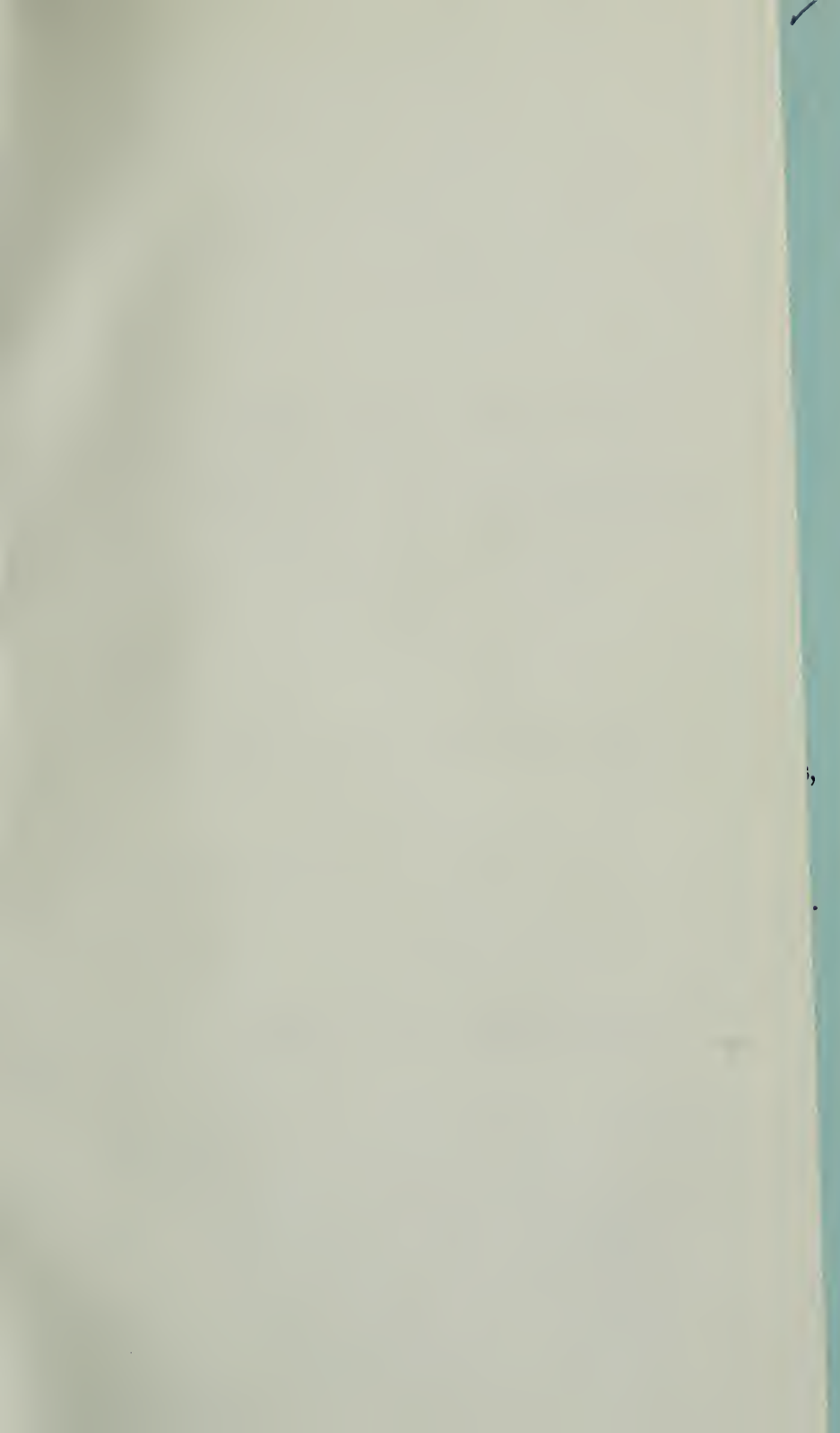
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**United States
Court of Appeals**
For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief for Appellants

STERLING M. WOOD

Billings, Montana

Attorney for Appellants

FILED

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SUBJECT INDEX

	Page
Statement of the pleadings and jurisdictional facts....	1
Statement of the case	3
Specification of errors	5
Argument	6

I.

The amended complaint herein does not state a cause of action in either of the counts pleaded.....	6
--	---

II.

The appellants are not liable in any event for the special assessments	17
--	----

III.

There are no "defects or omissions," and the F.H.A. has so certified	23
--	----

IV.

Conclusion	28
------------------	----

TABLE OF AUTHORITIES CITED

Cases	Pages
Addison et al. vs. Holly Hill Fruit Products, 322 U.S. 607, 88 L. Ed. 1488	11
Bemis vs. First National Bank (Ark.) 40 S.W. 127....	19
Hollingsworth et al. vs. Federal Mining & Smelting Co. (United States Intervener) 74 Fed. Sup. 1009	7
Re. opinion of the Justices (N.H.) 179 Atl. 344	26
Sedivy vs. Superior Home Builders, 188 F. (2d) 729	9
Shilkret vs. Musicraft Records, Inc., 131 F. (2nd) 929	12
U.S. vs. Fortier et al., 342 U.S. 160, 96 L. Ed. 179..7 &	15
U.S. vs. Harold T. Lindsay, et al., 346 U.S. 586, 98 L. Ed. 300	15
U.S. vs. Fletcher Savings & Trust Co., (Ind.) 151 N.E. 420	16
U.S. vs. Kaufman, 96 U.S. 567, 24 L. Ed. 792	26
Walsh vs. Alaska S.S. Co., (Wn.) 172 Pac. 269	12
Wilmington Truck Co. vs. U.S., 28 F. (2d) 205	8
Woods vs. Richman et al., 174 F. (2d) 614	14

Texts

Lewis Sutherland on Statutory Construction, 2nd Ed. Vol. 2 Par. 390 and 422 and 368 and 494	11-19-21
59 C. J. Statutes, Par. 644, page 1093	11
50 Am. Jur., Statutes, Par. 434	12
82 C.J.S., Statutes, Par. 383, page 895	12

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**STATEMENT OF THE PLEADINGS AND
JURISDICTIONAL FACTS**

The action here involved was instituted in the United States District Court for the District of Montana, Billings Division, by United States of America, as plaintiff, against the appellants, A. W. Hartwig and Jeff Tingle, and also one W. C. Jennings, as defendants, the latter of whom has died.

The amended complaint (Tr. 2, et seq.) and the attitude of government counsel throughout this case, establish that the United States of America contends that jurisdiction, primarily, of this action is conferred by the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App., Sec. 1821, et seq.), and by Priorities

Regulation No. 33 promulgated by the Civilian Production Administration, which contentions are denied in the answer of the Appellants (Tr. 40 et seq.). The said answer also denies the allegation of the amended complaint that Priorities Regulation No. 33 has been in effect at all times material to this action, and, generally, the answer puts the government to its proof. This action was brought October 8, 1948 (Tr. 1).

This action purports to be one in equity for a mandatory injunction, *first*, directing the Appellants here to complete the construction of the dwellings involved or that the value of the non-conformity be awarded to the purchasers, and *second*, directing the Appellants to restore to the purchasers named certain claimed overcharges received by the said Appellants in the sale of dwellings at prices in excess of approved maximum prices, and *third*, directing the Appellants to make restitution to each of the said purchasers by paying and satisfying certain special improvement levies or taxes imposed by county authorities against dwellings purchased, or, in the alternative, by paying the amounts of such taxes to the said purchasers.

The issues of fact herein were referred to a Special Master appointed by the lower court (Tr. 155) who made his report to the Court (Tr. 156 et seq.) with findings therein for the government. To this report the Appellants duly filed written objections (Tr. 161 et seq.) and then moved the lower Court (Tr. 203 et seq.) to act on the report of the Master and upon the objections thereto

and to reject the report in its entirety. The Court, however, accepted and approved the report of the Special Master (Tr. 206) and then rendered judgment for the government accordingly (Tr. 223), which was entered February 24, 1956, from which judgment the Appellants have appealed to this Court, (Tr. 227 et seq.).

The jurisdiction of this Court is based on U. S. Codes, Title 28, Section 1291, which provides that the Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

STATEMENT OF THE CASE

The Appellee, the United States of America, plaintiff in the lower Court, declared in its amended complaint (Tr. 2 et seq.) upon two counts. The appeal is from the judgment rendered in favor of the government on both counts.

In the first count it is alleged that the Appellants here, defendants below, applied for and received authorization for priorities assistance from the government to construct a number of dwellings in Montana and that the maximum sales price finally established was \$8,000.00 for each dwelling for which the priorities assistance was granted. Then it is alleged that the Appellants represented, by plans and specifications and otherwise, that the said maximum sales price included all special assessments and that such established maximum sales price was required by Priorities Regulation No. 33 to include all such improvements as water mains, sewers, etc. It is fin-

ally alleged in this count that, after the issuance of authorization and priorities assistance and during the time Priorities Regulation No. 33 remained in effect, the said Appellants sold 25 authorized dwellings and violated the Acts involved and the said Regulation by selling some of the dwellings at prices in excess of the maximum sales prices approved by the Federal Housing Administration, and by failing to construct the dwellings in accordance with the said plans and specifications, and the government then lists claimed excessive sale prices and defects and omissions in an attached schedule, as a result of which it is alleged finally in this count that the Appellants were enriched and the purchasers of the dwellings constructed have been deprived of things of value to which they were entitled.

In the second count most of the allegations of the first count, as above, are repeated, and it is alleged, further, that the Appellants violated the law and the regulations by selling the dwellings involved without taking care of special improvement taxes assessed against the properties involved.

The answer of the Appellants to the amended complaint puts in issue the essential allegations of that amended complaint. Furthermore, the Appellants pleaded defensively in their said answer that in good faith they constructed and completed the housing accommodations, to which the second count of the amended complaint refers, in substantial compliance with the specifications, descriptions of material and plans involved and approved, and

that, then, the plaintiff, the Appellee here, acting through the Federal Housing Administration, inspected and accepted the dwellings so completed as in full conformity with the specifications, descriptions and plans, and as full performance by and on the part of the defendants, the Appellants here, of their contract with the government, or otherwise, for the construction and completion of the housing accommodations and as full satisfaction and in full discharge of all and every the obligations of the said Appellants, or either of them, under any such contract.

The question involved upon this appeal is primarily whether the lower Court erred in the rendition of its judgment of February 24, 1956, based upon its adoption of the report and findings of the Special Master and the making by the Court of an order in that connection.

SPECIFICATION OF ERRORS

Specification of Error No. 1.

The lower Court erred in rendering the judgment (Tr. 223 et seq.) herein.

Specification of Error No. 2.

The lower Court erred in the making of its order (Tr. 206 et seq.) and in not sustaining the objections of the Appellants to the report of the Special Master. (Tr. 161 et seq.)

ARGUMENT

I.

THE AMENDED COMPLAINT HEREIN
DOES NOT STATE A CAUSE OF ACTION
IN EITHER OF THE COUNTS PLEADED.

To epitomize, before the submission of argument and authority in support of the above captioned contention of the Appellants herein:-

The Appellee, the United States of America, has taken the position herein that a basis for this action is found in the Act of Congress, known as the Veterans Emergency Housing Act of 1946, and in Priorities Regulation No. 33 issued by the Civilian Production Administration; but Appellants contend that the repeal by Congress, by the Housing and Rent Act of 1947, (before the action at bar was brought) of the said 1946 Act, operated also to repeal the said Regulation, and deprived the Appellee of the right to bring this action. Furthermore, Appellants contend that the United States of America, by reason of the complete change of policy effected by the said 1947 Act of Congress, had no right, in any event, to bring this action in equity. Argument now follows in support of the foregoing contentions.

Upon June 30, 1947, the Veterans Emergency Housing Act of 1946, upon which, under the amended complaint herein, this action is based in part, was repealed by the Housing and Rent Act of 1947. The repeal clause of the 1947 act repeals expressly the various sections of the 1946 Act involved, and concludes with the following proviso, viz:-

“Provided, that any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said act, and before the date of the enactment of this act, with respect to veterans of World War II, their families, and others, shall remain in full force and effect.”

It is apparent, as a matter of common sense, and apart from decided cases or argument, that the 1946 Act was wiped out, as it were, by the said Act of Congress, *except only* as to the allocations, etc., designated in the above quoted proviso of the 1947 Act, which do not include the claims made the basis of the action at bar. The only authority of law for the promulgation of Priorities Regulation No. 33 (upon which Regulation the United States of America, the Appellee herein, predicates some of its pleaded claim to relief in this action) will be found in the said 1946 Act—the Veterans Emergency Housing Act. When that 1946 Act was repealed, by the Housing and Rent Act of 1947, such repeal operated also to repeal the said Regulation, as we read the decision of the Supreme Court of the United States in *U.S. v. Fortier et al.*, 342 U.S. 160, 96 L.Ed. 179.

The said Priorities Regulation No. 33 is not a statute, in any sense of the word and, consequently, its repeal, when statutory authority for the Regulation was repealed by the said 1947 Act, destroyed the Regulation in its entirety and left it without legal effect when the action at bar was brought in 1948. In *Hollingsworth et al. vs. Federal Mining & Smelting Co.* (United States, Intervener) 74 Fed. Sup. 1009, par. 4 of the syllabus provides:-

“Where an Act of Congress concerns the welfare of the public at large as well as of a particular class (the condition which exists in the case at bar) persons acting under such act are deemed to have acted in contemplation of power of Congress to modify or repeal and that any such modification or repeal will limit or take away rights of recovery unless it is provided in act itself that rights are not to be affected.”

As to the effect of the repeal of the 1946 Act by the Housing and Rent Act of 1947, we cite the case of *Wilmington Truck Co. vs. United States* 28 F(2d) 205 and 208, where the court applies a federal statute (upon which the Appellee relies herein) and also a decision by the Supreme Court of the United States. The following is quoted from the *Wilmington Truck Co.* case, to-wit:-

“Section 13 of the Revised Statutes is also relied upon to show that the liability for the tax was not destroyed by the repeal of the statute. This section provides:

“‘The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.’ ***** 1 U.S.C.A. sec. 29. Of this statute the court, in *Great Northern Railroad vs. United States*, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567, said: As it ‘has only the force of a statute, its provision cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.’ As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, *with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others.* To enlarge the exceptions by adding the provisions of section 13 of the Revised Statutes thereto,

or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R. S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be plain disregard of the will of Congress as manifested in the repealing act. *Fletcher v. Peck*, 6 Cranch, 125, 3 L. Ed. 162."

Consequently, on and after June 30, 1947, the Veterans Emergency Housing Act of 1946, upon which the Government relies in this case, ceased to exist, except only to the extent of the proviso in the repeal act above mentioned; and that proviso does not keep effective, either directly or indirectly, any such right of action as the United States of America claims here.

Attention is also called to the case of *Sedivy vs. Superior Home Builders*, decided by the Court of Appeals for the Seventh Circuit, and reported in 188 F. (2d) 729. While in the *Sedivy* case the point here involved and presented was not considered specifically, it was indirectly. The court has made clear its thinking, as we view it, which is that the Veterans Emergency Housing Act of 1946 was so repealed, by the 1947 Act, as to leave no right, for the recovery of damages or overcharges, vested in anyone. The following is quoted from the decision in the *Sedivy* case:

"We assume that 'by this act' plaintiffs refer to the act of 1947, which became effective June 30, 1947, and by its terms repealed the 1946 Act as of that date. *Admittedly, the 1947 Act contained no maximum price at which housing accommodations could be sold, and, therefore, no right on behalf of a purchaser to sue for an overcharge.* As we understand, plaintiffs

do not contend otherwise but assert that the right created by the 1946 Act survived without any limitation period during which suit must be brought. In this connection it is also argued that Priorities Regulation No. 33 remained in full force and effect until December 31, 1947.

"We think the contention must be rejected. The act of 1947, Title 50 U.S.C.A. Appendix, Sec. 1881, et seq., provides: 'Sections 1, 2(b) through 9, and Sections 11 and 12 of Public Law 388, Seventy-ninth Congress (Sections 1821, 1822(b-d), 1823-1829, 1831 and 1832 of this Appendix), are hereby repealed ****.' Obviously, this repeal language includes section 7(d) (heretofore quoted) of the 1946 Act. However, plaintiffs rely upon a proviso which follows the repealing provision and which states: 'That any allocations made or committed, or priorities granted for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act (June 30, 1947), **** shall remain in full force and effect.' *It plainly appears that this proviso relates solely to allocations and priorities made and granted while the 1946 Act was in effect, and that it was not directed at or intended to retain in force the maximum selling price contained in the repealed Act. That provision, as shown, was expressly repealed. It is true, as plaintiffs state, that the 1947 Act contains no limitation period, but that fact militates against plaintiffs' contention. Certainly there was no occasion to fix a limitation period on the exercise of a right which had been repealed. Plaintiff's contention leads to the incongruous result that if the 1946 Act were still in effect, the limitation period which it contained would constitute a barrier to the instant suits but that such suits may be maintained under the 1947 Act because the latter contains no limitation period. Evidently Congress by the 1947 Act intended to restrict rather than expand the right conferred by the 1946 Act.*"

Thus, the repeal of the 1946 Act by the 1947 Act, with the proviso therein above quoted, left the 1946 Act unaffected by the provisions of the statute referred to as 1 U.S.C. 109, and relied upon now by the United States of America, the Appellee herein.

Supplementing the foregoing authorities, attention is called to Lewis Sutherland on Statutory Construction, 2nd Ed., Vol. 2, Par. 494, on Page 923, where the author says:-

“An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law and enumeration weakens it as to things not expressed.”

In the case of Addison et al. vs. Holly Hill Fruit Products, 322 U.S. 607, 88 L. Ed. 1488, the court rules that: “Exemptions from the operation of a statute made in detail preclude their enlargement by implication.”

The attention of the court is also directed to the provisions of 59 C. J., Statutes, Par. 644, page 1093, where the author says:-

“A saving clause is an exception of special things out of the general things mentioned in the statute; something smaller than the thing itself and yet not nullifying it. Its usual function is not to create anything, but to preserve something from immediate interference, and its most common use is in repealing statutes for the purpose of saving from their operations rights accrued, duties imposed, penalties, or other liabilities incurred, and proceedings commenced. A saving clause in a saving or construction section should not be confused with a saving clause in a repealing section; in the former enumeration is made to save the

enumerated things, not to destroy the things not enumerated, but *where there is an express repealing section* (and that is the situation in the case at bar) *the saving clause saves only what it embraces, and all things not enumerated are destroyed*, not because they are not included in the saving clause, but by virtue of the destructive force of the repealing portion of the Act. *A saving clause must ordinarily be strictly construed, so as not to include anything not fairly within its terms."*

See, also, to the same effect as above, 50 Am. Jur., Statutes, Par. 434, and 82 C.J.S., Statutes, Par. 383, page 895. A case cited in connection with the rule there expressed is that of *Walsh vs. Alaska S. S. Co.*, (Wn.) 172 Pac. 269, where the court, by adopting the language of an argument of counsel in the case, announces the following rule:

"Where there is an express repealing section, all things not enumerated in the saving clause are destroyed by the express provisions of the repealing portion of the section *****. The saving clause saves only what it embraces and all not embraced are destroyed."

In *Shilkret vs. Musicraft Records, Inc.*, 131 Fed. (2) 929, the court says:

"It is an established rule of statutory construction that a proviso (such as we have here in the repeal clause of the 1947 law directed at the 1946 Act) states an exception from the general policy which the law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment."

These settled rules of construction may not be ignored in passing upon the effect of the 1947 Act herein involved. Under the various authorities cited, *supra*, the 1947 Act left the United States of America, in the case at bar, with

no right of action whatever against the Appellants. In other words, 1 U.S.C. 109 has no application in the case at bar because the repealing act, of 1947, is effective to extinguish any "liability incurred" under the 1946 Act, in that the 1947 Act does "so expressly provide."

It should be stressed that this action was brought upon October 12, 1948, and that it was brought by the United States of America, as plaintiff, and not by any property owner or by the Housing Expeditor. Next it should be noted that the Housing and Rent Act of 1946 protected any allocation made or committed or priorities granted for building materials of Veterans of World War II or their families under the Veterans Emergency Housing Act. In other words, this protection was continued in effect in the Housing and Rent Act of 1947, to honor any such commitments as aforesaid as might still exist. Then, having repealed the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947, Congress addressed itself specifically to the problem of Veterans' Housing, in the said Housing and Rent Act of 1947. Thus, it is provided that no single family dwelling, the construction of which is completed after the date of the enactment of the Act and prior to March 1, 1948, shall be sold or offered for sale prior to the expiration of thirty days after construction is completed for occupancy by persons other than Veterans of World War II or their families. It is further provided in the 1947 law last mentioned that no such dwelling house shall be sold or offered for sale to any person at a price less than the price

for which it is offered to veterans or their families. If Congress had intended to keep in force any maximum selling prices, which had theretofore been imposed under Priorities Regulation No. 33, it would have been natural to express such intent (which was not done) in the proviso to paragraph 1(a) of the Housing and Rent Act of 1947, which repealed the Veterans Emergency Housing Act and Rent Act of 1947, (the statutory basis for Priorities Regulation No. 33). The repeal of the Veterans Emergency Housing Act of 1946 by the 1947 law mentioned covered practically all of the sections of the Veterans Emergency Housing Act of 1946 and did so *specifically*.

The Housing and Rent Act of June 30, 1947 *completely changed the policy of Congress* as expressed previously in the Veterans Emergency Housing Act of 1946.

This court, in the case of Woods vs. Richman et al., reported in 174 F.(2d) 614, has the following to say, which is most pertinent here, to-wit:

“Had the Congressional policy in respect to rent control lapsed with the expiration on June 30, 1947, of the Emergency Price Control Act, we would assume that an order designed primarily to vindicate the defunct policy would no longer be appropriate in equity.”

In other words, when the policy of the Veterans Emergency Housing Act was changed by the adoption by Congress of the June 30, 1947, law, it then became no longer possible, under the law, for the Government of the United States to proceed in equity, as attempted in the

case at bar, to enforce the defunct policy of the Veterans Emergency Housing Act of 1946; and there is nothing in the 1946 Act itself, that gives any right to the Government to so proceed. This is another way of saying that the amended complaint herein does not state a cause of action in either of the counts involved.

It is pertinent to refer to a case decided January 8, 1954, by the Supreme Court of the United States, being *United States of America vs. Harold T. Lindsay, et al.*, 346 U.S. 568, 98 L.Ed. 300. In that case the court had occasion to rule as follows:-

“Congress has unquestioned power to bar recovery on claims of the federal government if it sees fit.”

Another decision of consequence in this connection is that of *United States of America vs. Fortier, et al.*, 342 U.S. 160, 96 L.Ed. 179, where the court has the following to say about the law here involved:-

“The 1946 Act contained detailed authorization for price restrictions on houses and for priorities on building materials. When that Act was repealed in 1947, Congress provided for veterans’ preferences in the sale and rental of housing and for rent ceilings on certain accommodations constructed with the assistance of priorities secured under the 1946 Act. Congress addressed itself to the problem of veterans’ housing, but refrained from imposing any price restrictions on the sale of houses.”

In other words, the Supreme Court of the United States points out the change in policy brought about by the repeal of the Veterans Emergency Housing Act of 1946 by the 1947 law.

When coming into a court of equity, as the United

States of America has done in the case at bar, it must show an equity in its favor. (See *United States vs. Fletcher Savings and Trust Company (Ind.)* 151 N.E., 420.) But there is no equity in the government's stand in the suit at bar, based, as the suit is, on a policy of Congress that had been completely changed, and the government's right in the premises repealed, and long before this so-called equitable action was brought.

To summarize, briefly, under this subdivision of the argument herein, the amended complaint in this action does not state a cause of action, in either of its counts, against the Appellants, because of the repeal, by the 1947 Act, of the 1946 Act, and of Priorities Regulation No. 33, upon which the action at bar is based, such repeal in the 1947 Act being made with a reservation of some rights but not with the reservation of the right to prosecute this action which the government has brought. Then, too, the policy of Congress has been completely changed as a result of the aforesaid repeal of the 1946 Act, and this policy was changed upon June 30, 1947, long before this action was brought in the fall of 1948. This repeal in 1947 of the 1946 statute and of the said Regulation, and of the policy of Congress under the 1946 statute, left the government without any right to bring this so-called equitable action in the fall of 1948, predicated, as it is, upon the theory a then existing policy of Congress was being enforced.

The fact may not be overlooked that, under the argument and authorities *supra*, it is clear that not only was the

Veterans Emergency Housing Act of 1946 repealed in June, 1947, but that there was necessarily repealed at the same time Priorities Regulation No. 33 which had its basis solely and only in the Veterans Emergency Housing Act of 1946. The amended complaint herein is based specifically upon the Veterans Emergency Housing Act of 1946 *and* upon Priorities Regulation No. 33, and this has been done in face of the fact that the said Act and the Regulation had no legal existence when the suit was brought.

There is no basis, in law, or in equity, for the institution of the action at bar, and the amended complaint herein does not state a cause of action in either of the counts pleaded. The Appellants are not liable to the government in this suit for any of the claims the government asserts. There is no foundation, in fact or in law, for the report of the Special Master, that has been excepted to by the Appellants, or for the judgment, which the lower court entered, based upon the illegal and unwarranted findings of the Master herein. That judgment, under the law, should be reversed and set aside.

II.

THE APPELLANTS ARE NOT LIABLE IN ANY EVENT FOR THE SPECIAL ASSESSMENTS.

In the first place, under this subdivision of the argument herein, it is important to consider Priorities Regulation No. 33. That regulation, at the outset thereof, reads as follows, to-wit:

"This regulation sets up the Reconversion Housing Program of the Civilian Production Administration. It is designed to assist private builders, educational institutions and others to build moderate cost housing accommodations to which veterans of World War II will be given preference, by giving an HH preference rating for certain building materials for the construction. The regulation describes the method of applying for the HH rating, the circumstances under which the rating will be assigned, the materials for which it will be given and the condition imposed on the builder and succeeding owners in selling or renting the accommodations as long as this regulation is in force."

It is particularly worthy of note, in support of this argument that the regulation specifically refers to housing *accommodations*. Furthermore, the whole purport of the Regulation, without going into further details, is that builders, under that Regulation, can get materials for the construction of *accommodations*. In other words, the builder is to build and is to get the material for those building operations. Not a word can be found in this Regulation regarding matters that are handled, in every state of the union, by city and county authorities only, such as the paving of streets, etc., resulting in special assessments that become liens on real estate.

Thus, under settled rules of statutory construction, the following language of Priorities Regulation No. 33, upon which the government is standing in the case at bar to establish liability of the Appellants for special assessments levied, does not mean, and cannot be distorted to mean what the government contends, to-wit:

"A builder must not sell a one-family dwelling built

or converted under the Reconversion Housing Program, including the land and *all improvements* (including garage if provided), for more than the maximum sales price specified in the application," etc.

Neither directly nor by implication does the plain language of this quoted clause obligate a builder, upon making a sale, to take care of special assessments levied by public authorities against the land involved.

It is pertinent to here note the case of *Bemis vs. First National Bank*, (Ark.) 40 S.W. 127, where the court considers the phrase, "and all the improvements thereon," and rules that it is:-

"A phrase of such common use in our Western country to denote what ever has the character of a physical fixture."

And a "fixture" is defined by Sec. 67-209, Revised Codes of Montana, 1947, as follows:-

"67-209. (6669) Fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of building; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

In Lewis' *Sutherland Statutory Construction*, 2nd Ed., Par. 390, the Author says:

"As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they were used in a different sense."

Furthermore, in the same work on *Statutory Construction*, Par. 422, the Author says:

"When there are general words following particular

and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of *ejusdem generis*. Some judicial statements of this doctrine are here given. 'When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.' 'The rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to those designated by the particular words.' 'It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated.'

To all intents and purposes the Priorities Regulation here involved has been treated as a statute or a contract and must be so treated for the purposes of construction of its language.

Thus, standing upon the foregoing authorities alone, the word "improvements" in the Priorities Regulation above quoted has reference to things built by the builder (like houses and garages) and nothing else, which is another way of saying that by the word "improvements" in the said Regulation is meant and intended structures built

with material for which the builder gets a rating.

But it also is a settled rule of construction, as set forth in Lewis Sutherland on Statutory Construction, 2nd Ed., Par. 368, as follows, to-wit:

"The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole. It is not proper to confine the attention to the one section to be construed. 'It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution.'

Priorities Regulation No. 33 relates exclusively to building activities of accommodations for veterans, to be constructed by contractors and builders who have a priority for materials for such construction work. Thus, *construing the Regulation as a whole*, as must be done under the law, the word "improvements," here involved, necessarily means improvements that are constructed with material for which a builder is given a rating, and it can-

not be construed otherwise without doing violence to the Regulation and to the rules of construction, *supra*. This is simply another way of saying that there is no basis whatever in the law for arguing or contending that there is anything in Priorities Regulation No. 33, as applied to the case at bar, that obligates the Appellants, as contractors and builders, to take care of the special assessments that have been levied against the properties involved herein.

It cannot be argued legitimately that the mere verbal promises of the Appellants here, or one of them, to take care of the special assessments on the properties involved created any legal obligation in this connection that the government or anybody else can enforce. At best, the evidence in this connection in the record is of pure conversation on the subject, and nothing more. But the facts must be reckoned with that the truth of the statements of the witnesses for the government in this connection is repudiated by the witness Hartwig, as the record herein discloses. Furthermore, the testimony of the various persons for the government is completely repudiated by what they did later. In every instance, when the lands involved were sold by Messrs. Hartwig and Tingle, they were conveyed through dealings between the Security Trust and Savings Bank, of Billings, Montana, and the purchasers. The purchasers accepted straight warranty deeds, (the consideration therefor being the maximum sale price, in each sale, of \$8,000) from Messrs. Hartwig and Tingle, and their wives, which deeds bore dates as

of a time prior to the date in the fall of 1947 when the liens for the special assessments involved became such upon the lots in Calhoun Lane Subdivision. Thus, the warranty deeds given to the purchasers, as grantees, have the legal effect of making the said grantees liable (not the grantors) for assessments that attached, as liens, to the lots subsequent to the dates of the warranty deeds; and all of the special assessment liens did so attach subsequent to the execution and delivery of the deeds, and in the fall of 1947.

Therefore, there is nothing whatsoever in the record herein, or in the law, that gives the government, as Appellee, herein, or the property owners in Calhoun Lane Subdivision, any right whatsoever to collect from the defendants the special assessments levied upon the lands in Calhoun Lane Subdivision. The Priorities Regulation is wholly without force or effect in this connection; and there is nothing else in the record or the law upon which the government can stand to establish the claimed liability of the defendants in this connection.

III.

THERE ARE NO "DEFECTS OR OMISSIONS," AND THE FHA HAS SO CERTIFIED.

The contention under this subdivision of the argument is established on the record herein by the Compliance Inspection Report of the FHA in which it is certified by FHA officials as follows: "Building improvements acceptably completed." That inspection re-

port is signed by Mr. H. A. Viken, Construction Examiner, and is dated October 23, 1947. It further bears the certificate of L. O. Bradford of the FHA, and its acting chief architect, and the certificate of S. L. Berg, Chief Underwriter of the FHA, the latter certifying that there has been compliance, and firm commitment, and that closing papers may be submitted. To be specific, the Compliance Inspection Report referred to is Exhibit No. 20 ("Book of Exhibits" herein, page 378).

Apart from the Compliance Inspection Report mentioned, attention is also invited to Para. (e), of Priorities Regulation No. 33, which reads as follows, to-wit:

"Construction of the Project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application *except where he has obtained from the Federal Housing Administration approval for a change from the application.*"

Thus, apart from the finality of the Compliance Inspection Report, above mentioned, that Report also operates by its express language, as approval by the FHA of any changes from the description given in the application.

Incidentally, the testimony of Mr. Tingle is noteworthy in this connection. Without referring to it specifically herein, by many transcript references, Mr. Tingle, who is experienced in construction work, said, in substance, that the so-called "defects and omissions," that have been referred to, are really substitutions that were necessary and that were made in the progress of the

work with the knowledge and approval of the FHA and its inspectors. He said specifically that he did not omit anything in the construction of the houses without the consent and approval of the FHA inspectors, and that there were no defects, as such, in the work. Then, too, he explains why it became necessary to make some substitutions and changes in the original plans and specifications. The explanation is that, in substance, the year 1946 was one of the most difficult times for construction, that materials of all descriptions were exceedingly difficult to get hold of, especially for twenty-seven houses at one time rather than just merely one, and that not only were materials difficult to obtain, but prices were constantly going up. He says, too, that even though Messrs. Hartwig and Tingle had a priority right to secure materials for the houses, it wasn't the highest priority right and that there were two or three higher ratings that were in existence at the time, and the ratings Messrs. Hartwig and Tingle had only entitled them to purchase the material involved that could be located, to say nothing of finding a seller who would sell the material at the priority rating that Messrs. Hartwig and Tingle had. In conclusion, Mr. Tingle says it was because of these conditions that certain changes were made, and only changes that were made necessary by these conditions. Again Mr. Tingle says that, in the progress of the work, while these changes were being made, which the government refers to as "defects and omissions," the changes were approved by all of the inspectors and were ultimately approved in

the final Compliance Inspection Report. Mr. Tingle expressly repudiates that there were either construction defects or omissions in the work which Messrs. Hartwig and Tingle completed under the FHA arrangement and approval.

Apart from the argument, *supra*, in this subdivision hereof, in the case of *Re. opinion of the Justices*—a decision of the New Hampshire Supreme Court, reported in 179 Atl. 344, the court says:

“A valid administrative judgment has the same force of obligation and finality as a judicial one.”

As the court points out in that case, a ruling of this sort is required to produce “an efficient and effective administrative enforcement of the public interest.”

Attention is also called to the controlling case of *United States vs. Kaufman*, 24 L. Ed. 792, where a ruling was made by a Commissioner of Internal Revenue, and the Supreme Court of the United States had the following to say:

“It is now insisted that the finding of an allowance by the commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim. Such, we think, is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a *prima facie* liability of the Government; but when submitted and when al-

lowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the court found the adjudication against the Government, without impeachment, the liability to pay was established. We do not decide that in the Court of Claims the adjudication of the commissioner may not be impeached, but we do decide that, until impeached, it is binding, and that the affirmative of the impeachment is upon the Government."

Here, therefore, the government is bound by the rulings made by the FHA officials in the aforesaid Compliance Inspection Report (Exhibit 20). In other words, Exhibit 20 is the precise equivalent of a judgment in an ordinary action at law. Until that judgment is set aside and impeached, by proceedings proper in the premises (which has not been done herein), it must stand and be and remain final and conclusive. Upon the last mentioned grounds alone, therefore, without reference to the other points presented herein, the defendants are not liable for the so-called "defects and omissions."

And the fact may not be overlooked or disregarded, under the record herein, that, acting upon the strength of the Compliance Inspection Report above-mentioned, and in October, 1947, the Security Trust & Savings Bank, through which all transactions with the property owners in Calhoun Lane Subdivision were carried on, then released, on the strength of the Compliance Inspection Report, the moneys borrowed by the property owners, as mortgagors, from the Bank. Certainly under these conditions there is no equity in the claim which the govern-

ment now makes in this action; and yet this is a suit in equity in which the government pretends to stand upon equitable claims in a court of equity.

For all of the reasons advanced under this subdivision of the argument, it is clear that not only were there no "defects or omissions." so-called, in the work of the Appellees herein, but that, in any event, the government is not entitled to recover anything in connection with the claims it makes in this connection.

IV.

CONCLUSION

We feel that it will be helpful to the court if we here epitomize the objections the Appellants made to the Master's report, and that epitome is as follows, to-wit:

The Master erred in his report:-

1. In disregarding (a) the facts established of record, and (b) the applicable principles of law;
2. In failing to make the findings of fact requested by the Appellants;
3. In the making of his findings of fact and conclusions in that the said findings of fact and conclusions are contrary to the evidence in the record and are not in accordance therewith and, furthermore, do violence to and disregard the applicable and established principles of law presented in argument;
4. In disregarding the objection made by Appellants' counsel at the outset of the hearing before the Master to the introduction of any evidence upon the ground that the amended complaint fails to state a claim

against the Appellants, either jointly or severally, in either or both of the counts involved, upon which relief can be granted;

5. In paragraph 3 of his findings of fact and in the following statement made by the Master therein, to-wit: "This finding of fact is compelled by exhibit 15, in the face of which subsequent conflict in the testimony and argument by learned counsel for the defense must fail. The representations by the defendants that street and utilities improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said exhibit 15, are clear and unambiguous and were not altered by other exhibits or testimony." The Master erred in this connection in that said exhibit 15, as the Court will see from examining the exhibit, was made and submitted, as set forth specifically therein, upon *May 18th, 1946*, which was prior to the enactment into law, upon *May 22nd, 1946*, of the Veterans' Emergency Housing Act of 1946, upon which Act this action is predicated, and, accordingly, exhibit 15 was not made pursuant to or in furtherance of the said Act and is without legal effect in this action; and, in further support of the objections in this particular paragraph hereof set forth, attention is called to the objection made by the Appellants to offered exhibit No. 15, which objection was overruled, and this objection is predicated upon the ground that the exhibit was and is irrelevant for any purpose;

6. In paragraph 3 of his findings of fact in disregarding:-

(a) The plain language of the Veterans' Emergency Housing Act of 1946, which statute, in Section (3) thereof, defines "improvements" for the purpose of the law as "Improvements sold with the housing accommodations"; and (b) the fact of record that the Appellants have sold no improvements in their sales of housing accommodations; and (c) the fact that there is no evidence in the record that the Appellants have made any express or other representations that the maximum sale price established included or would include any special improvements of any kind;

7. In stating, as a finding, that it is his opinion that the approval of variations in construction by representatives of the Federal Housing Administration was not within the scope of their authority, and the Master so erred in that under paragraph 5 (e) of Priorities Regulation No. 33, it is provided that a builder who uses the rating therein provided for to get materials for housing accommodations must construct them in accordance with the description given in the application *except* where he has obtained from the Federal Housing Administration approval for change from the application; and in further support of this objection to the Master's report the record before the Master establishes, without contradiction, that any variations in construction work involved were neither defects nor omissions but were changes in construction that were approved, pursuant to law, by the

FHA, by the various Compliance Reports involved and placed in evidence.

To some extent these requested findings of fact include concise argument on some of the applicable law, as the Court will see from the foregoing language, which argument will not be further extended in this brief.

The Appellants submit that the objections they made to the Master's report, as above epitomized, were properly taken and should have been sustained.

As an argument that is directed at all of the contentions of the government in this case, as to special assessments, so-called defects and omissions, and otherwise, the extinguishment in June, 1947, of Priorities Regulation No. 33, left the government without any basis for this lawsuit. Even if it were conceded (and this would be done only for the purposes of this argument and not otherwise) that, by virtue of the Act of Congress, mentioned throughout this brief as 1 U.S.C. 109, the 1947 Act did not have the effect to release or extinguish any liability incurred under the 1946 Act, it must be borne in mind nevertheless, that the government stands primarily upon Priorities Regulation No. 33 as a basis for its claim to recover the special assessments involved, and the so-called defects and omissions. The government claims that liability of the Appellants for these items has been created by Priorities Regulation No. 33. The 1946 Act, as a matter of fact, contains no provisions such as are found in Priorities Regulation No. 33 with respect to the carrying on of construction work, plans and specifi-

cations in that connection, how they can be altered or modified, and what obligations the contractors shall be expected and required to assume and take care of. Thus, with Priorities Regulation No. 33 extinguished in June, 1947, there is no basis for proceeding in this suit (brought in 1948) since all of the claims of the government are based primarily upon the said Priorities Regulation No. 33 and the claimed requirements thereof. The said statute, 1 U.S.C. 109, relates solely to *statutes*, and has no application, by its terms, or otherwise, to *regulations* of the FHA or of any other federal body. In other words, the statute, 1 U.S.C. 109, does not purport, directly or indirectly, to keep in force any regulation whatsoever that is affected and extinguished by the repeal, as here, of a statute.

In final conclusion herein it is urged, upon both reason and authority, that there is no basis, in law or in fact, for the judgment rendered in the lower court and that it should be reversed, with directions to dismiss this action.

Respectfully submitted,

STERLING M. WOOD

Attorney for Appellants

United States
Circuit Court of Appeals
For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Montana

NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,
for the District of Montana,
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FILED

JAN 28 1957

PAUL P. O'BRIEN, CL

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INDEX

TABLE OF CONTENTS

	Page
STATEMENT OF CASE.....	1
Previous Appeal and Proceedings.....	2
Admissions in Appellants' Answer.....	4
Issues	5
ARGUMENT	6
Construction of Rule 53(e)(2).....	6
Plaintiff's Cause of Action is not Defeated by the Repeal of the Veterans' Emergency Housing Act of 1946	9
Defendants are Liable for the Special Assessments Appellants are Responsible for Construction Defi- ciencies and Omissions which Resulted in Un- authorized Overcharges to the Purchasers.....	13
CONCLUSIONS	16
	19

TABLE OF CASES CITED

	Page
Bank of Arizona v. United States, 73 F. 2d 811 (C.A. 9).....	18
Bjornson v. Alaska S.S. Co., 9 Cir., 193 F. 2d 433....	9
Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 2 Cir., 1949, 175 F. 2d, 77, 80.....	7
Burrows v. United States, 56 F. 2d 465 (Ct. Cls.)....	11
Carr v. Yokohama Specie Bank, Limited, 9th Cir., 200 F. 2d, 251.....	8
De La Rama S.S. Co. v. United States, 344 U.S. 386	10
Dougherty v. Miller, 36 Cal. 83.....	16
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380	18
Filor v. United States, 9 Wall. 45.....	18
Fleming v. Mohawk Co., 331 U.S. 111, Footnote 11	12
Gamewell Company v. City of Phoenix, 9th Cir., 216 F. 2d, 928.....	7
Glen Falls Indemnity Co. v. United States, 9th Cir., 1955, 229 F. 2d 370, 373.....	6
Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 1949, 336 U.S. 271, 275.....	7
A. W. Hartwig v. United States, 209 F. 2d 604, (C.A. 9).....	9
Lew Wah Fook v. Brownell, 9th Cir., 218 F. 2d 924.....	8
McNay, D.C. Cal., 1945, 58 F. Supp. 960.....	6
Pruitt v. Litman, E.D. Pa. 1949, 89 F. Supp. 705, 706	13
Rheinberger v. Reiling, 89 F. Supp. 598, 601 (D. Minn.).....	11
Schoenheit v. Lucas, 44 F. 2d 476, 490 (C.A. 4).....	11

TABLE OF CASES CITED (Continued)

	Page
Sedivy v. Superior Home Builders, 188 F. 2d 729 (C.A. 7).....	11
Swords v. Simineo, 68 M. 164, 216, P. 806.....	16
United States v. Austin, 100 F. Supp. 33, 42 (D. Md.).....	18
United States v. Carter, 171 F. 2d 530 (C.A. 5).....	11
United States v. Fortier, 342 U.S. 160.....	10, 11
United States v. Gypsum Co., 1948, 333 U.S. 364, 395	7, 8
United States v. McNair, 180 F. 2d 273 (C.A. 9).....	10, 11
United States v. See, 194 F. 2d 100 (C.A. 9).....	11
United States v. Oregon Medical Society, 1952, 343, U.S. 326, 339.....	8
Utah Power & Light Co. v. United States, 243 U.S. 389	18
Whiteside v. United States, 93 U.S. 247, 257.....	19
Wilmington Trust Co. v. United States, 28 F. 2d 205 (D. Del.).....	11
Woods v. Richman, 174 F. 2d 614 (C.A. 9).....	11

TABLE OF STATUTES CITED

	Page
Administrative Procedure Act (5 U.S.C. 1001).....	19
Housing and Rent Act of 1947, 61 Stat. 193.....	12, 13
Rule 52 (e)(2) Federal Rules of Civil Procedure.....	6, 7
Rule 53 (e)(2) Federal Rules of Civil Procedure.....	6
Section 2(a)(6), Title III of the Second War Powers Act (56 Stat. 176, 50 App. U.S.C. 633).....	1, 2
Sections 7(a) and 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App., Section 1821, et seq.).....	1, 2, 6, 9, 10, 11, 12, 17, 19
Section 24 of the Judicial Code (54 Stat. 143 28 U.S.C.A. 41).....	1
1 United States Code 109.....	9, 10, 11, 12, 13

TABLE OF REGULATIONS CITED

Executive Order 9836 (11 F.R. 1939).....	2
24 C.F.R., 1946 Supp. 707.16.....	15
Housing Expediter Priorities Order 1 (11 F.R. 9507) dated August 27, 1946.....	2
Housing Expediter Priorities Order 5, effective April 1, 1947 (12 F.R. 2111).....	2
Priorities Regulation 33, effective January 16, 1946	1, 2, 14, 15, 17

No. 15145

United States
Circuit Court of Appeals
For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF CASE

This civil action was brought by the United States of America under the provisions of Section 2(a)(6), Title III of the Second War Powers Act (56 Stat. 176, 50 App. U.S.C. 633), Sections 7(a) and 7(c) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Section 1821 et seq.), and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41). The action was brought to require the defendant to make restitution to certain named purchasers of overcharges above the maximum ceiling price set by the Federal Housing Administration and for the value of construction deficiencies in the sale of the dwellings, in violation of Priorities Regulation 33, issued pursuant to the Veterans Emergency Housing Act of 1946, *supra*.

Under the provisions of Title III of the Second War

Powers Act of 1942, as amended (56 Stat. 176, Title 50, App. U.S.C.A. Section 633) and Executive Orders issued thereunder, the Civilian Production Administration issued Priorities Regulation 33, effective January 16, 1946. Subsequently, on August 27, 1946, the Housing Expediter in Housing Expediter Priorities Order 1 (11 F.R. 9507) delegated to the Civilian Production Administration, the priorities and allocation powers contained in Sections 4 and 7 of the Veterans Emergency Housing Act of 1946. The Civilian Production Administration exercised such powers in the issuance of amendments to Schedule A of Priorities Regulation 33, and said regulation was, by virtue of said amendment, after August 27, 1946, continued in effect under the authority of both the Second War Powers Act of 1942, as amended, and the Veterans Emergency Housing Act of 1946. Subsequently, pursuant to the provisions of Housing Expediter Priorities Order 5, effective April 1, 1947 (12 F.R. 2111) and Executive Order 9836 (11 F.R. 1939), the Housing Expediter continued in effect said Priorities Regulation 33 under the Veterans Emergency Housing Act of 1946 alone, until December 31, 1947.

PREVIOUS APPEAL AND PROCEEDINGS

This case was previously appealed (No. 13,267, 209 F2d 604) by these appellants from the District Court's Order on Motion for Summary Judgment (Tr. 135 et seq.) entered November 19, 1951, relative to the special improvement charges the purchasers were required to pay in addition to the maximum sales price established by the Federal Housing Administration, hereafter referred to

as F.H.A. This Court remanded the cause for further proceedings to determine whether the houses, or any of them, had been sold in excess of the maximum price of \$8,000.00, and with reference to appellee's contention that a summary judgment was required as a matter of law, this Court said:

"In any event, this could not be so unless an admission was made that these levies required the purchasers to pay an amount in excess of the maximum price of \$8,000.00 which, as we have pointed out, is specifically denied."

After the former appeal further proceedings were had by a hearing before a Special Master appointed by the District Court (Tr. 155, 156) on the issues of fact pertaining to the overcharges and the "construction defects and omissions" as alleged in appellee's Amended Complaint. The Special Master filed his report (Tr. 156-161) finding that in addition to the maximum established sale price of \$8,000.00, each purchaser named in his report, or the successor in interest, was charged or paid specific sums for street and utility improvements. The Special Master also made a finding as to the reasonable value of the "construction defects and omissions" for each house involved in this action.

Objections to the Special Master's Report were filed by appellants, following which the District Court made and filed its Order on January 6, 1956. (Tr. 206-222). A judgment based upon the Court's findings, conclusions and decision was filed and entered February 24, 1956 (Tr. 223-226). The foregoing Order and Judgment con-

stitute appellants' Specification of Errors No. 1 and No. 2. (Appellants' Brief 5).

ADMISSIONS IN APPELLANTS' ANSWER

In addition to appellants' statement of the case (Appellants' Brief 3, et seq.) it must be observed that the Answer of appellants (Tr. 40, et seq.) admits among other things that they applied for and on or about July 1, 1946, received authorization for priorities assistance to construct 27 dwelling units in Montana; "that on or about November 4, 1946, the Federal Housing Administration on application of these defendants (appellants) established a maximum sales price of \$8,000.00 for each such dwelling unit, the first such price so established theretofore of \$6,000.00 having been first so increased to \$6,465.00 per unit; that the increases so established in the maximum sale price of each dwelling unit aforesaid were made at the request of these defendants and upon the basis of certain written specifications of date June 4, 1946, and a certain written description of the requisite materials, dated June 15, 1946, both submitted by these defendants to the Federal Housing Administration, and further of the certain plans tendered therewith covering the construction of the types of dwelling units aforesaid, viz., Type I and Type 1-a, which were then and there under construction and also upon the basis of certain written estimates and breakdowns of construction costs entering into the units so under construction or to be constructed, and that the final maximum sales price of \$8,000.00 for each dwelling unit aforesaid was duly approved." (Tr. 42 and 43). "They admit that they used Priorities Applica-

tion No. 6-093-269 to obtain some building materials actually used in the construction of the dwellings more particularly described in Exhibit A, pages 1 to 24, to the plaintiff's (appellee's) Amended Complaint annexed. * * * They admit that after the issuance by the Federal Housing Administration of authorization as aforesaid for priorities assistance these defendants (appellants) completed the construction of, and sold, twenty-five buildings under the said priority, and of the dwelling units identified by the Federal Housing Administration serial numbers aforesaid." (Tr. 43). They further admit they petitioned the county authorities to create a special improvement district for the construction of water mains, sewers, concrete curbs, gutters and oil mix pavements, which district was approved November 8, 1946 (four days after the final maximum sales price was established); and that on July 28, 1947, the special improvement assessments became a lien against all the property in the district and thereafter was regularly assessed for the improvements, and that A. W. Hartwig Construction Company was paid for the construction of those special improvements.

ISSUES

From the Amended Complaint and Answer, it appears the issues raised by appellants in this appeal are as follows:

1. Is the District Court's findings, conclusions and decision (Tr. 206-222) and its Judgment (Tr. 223-226) clearly erroneous under Rule 52 (e)(2) F.R.C.P.?
2. Was appellee's cause of action defeated by the repeal

of the Veterans' Emergency Housing Act of 1946 (supra)?

3. Was it required that the special improvement charges be included in the maximum sales price of \$8,000.00 for each dwelling, "including the land and all improvements (including garage if provided)"?
4. Were the "construction defects and omissions" properly approved by the F.H.A.?

ARGUMENT

I.

CONSTRUCTION OF RULE 53(e)(2)

Rule 53(e)(2) provides in the relevant parts:

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

This rule has been construed to put the burden upon the appellants in this appeal to show where the adoption or modification of the master's findings is clearly erroneous. *Glens Falls Indemnity Co. v. United States*, 9 Cir., 1955, 229 F. 2d 370, 373.

It has also been held that the trier of the fact, whether commissioner, master, referee or judge, will be sustained on appeal or review unless they are clearly erroneous, (*In re McNay*, D.C. Cal., 1945, 58 F. Supp. 960) therefore the construction given to the words "clearly erroneous" in Rule 52 (a) F.R.C.P. may also be cited as authority in this particular argument.

Rule 52 (a) has been construed by this Circuit in numerous cases and is well defined in *Gamerwell Company v. City of Phoenix*, 9th Circuit, 216 F. 2d, 928, wherein it is stated:

"The Findings stand before us with the presumption of validity unless they are clearly erroneous. (Rule 52 (a), Federal Rules of Civil Procedure.) The object of the clause as to the effect of findings is to give to findings the effect which they formerly had in equity. *United States v. Gypsum Co.*, 1948, 333 U.S. 364, 395. The aim is to

' . . . make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings.' *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 1949, 336 U.S. 271, 275."

This advantage has been well stated by the Court of Appeals for the Second Circuit:

"For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' . . . The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court; by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned." *Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 2 Cir., 1949, 175 F. 2d, 77, 80.

Conversely, the Supreme Court has held that a finding is clearly erroneous when

" . . . although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, supra, p. 395.

To the same effect is *United States v. Oregon Medical Society*, 1952, 343, U.S. 326, 339.

and also *Lew Wah Fook v. Brownell*, 9th Cir. 218 F. 2d, 924:

"So far as we have seen, this is the plainest of cases in which we are asked to retry the facts. Appellant asks us to apply the doctrine of the case of *United States v. United Gypsum Co.*, 333 U.S. 364-395, wherein it is held, 'Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings of administrative agencies or by a jury, this court (Supreme Court and this court, too, of course) may reverse findings of fact by a trial court where "clearly erroneous." . . . A finding if clearly erroneous where although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' This simple statement does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous.' By this test in the instant case, the judgment is not clearly erroneous. However, even if we should approach the problem as the original triers of fact upon the bare record, our conclusion would be the same. We briefly digest sufficient of the evidence to support our conclusions."

and with reference to conflicting evidence the Court states, in *Carr v. Yokohama Specie Bank, Limited*, 9th Cir., 200 F. 2d, 251:

". . . where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that Court to choose between two permissible and conflicting views as to the weight of the evidence.

Bjornson v. Alaska S.S. Co., 9 Cir., 193 F. 2d, 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous."

II.

PLAINTIFF'S CAUSE OF ACTION IS NOT DEFEATED BY THE REPEAL OF THE VETERANS' EMERGENCY HOUSING ACT OF 1946.

The established policy of Congress with respect to liabilities incurred under a statute which is thereafter repealed is stated in 1 U.S.C. 109 which provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.* The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. (Italics added.)

Since it is conceded that the sale of all dwellings referred to in the complaint occurred prior to the repeal of the Veterans' Emergency Housing Act of 1946 on June 30, 1947 (see *A. W. Hartwig, v. United States*, 209 F. 2d, 604 (C.A. 9), the quoted provisions of 1 U.S.C. 109 are

clearly applicable.¹ 1 U.S.C. 109 is but a codification of R.S. 13, adopted in 1871, as amended. H. Rep. 251, 80th Cong., 1st Sess.; S. Rep. 658, 80th Cong., 1st Sess. Thus, the policy of Congress authorizing the enforcement of causes of action arising prior to the repeal of statutes subsequent to such repeal is one of long standing and this is the policy which was in effect when the Veterans' Emergency Housing Act of 1946 was repealed. Thus, contrary to the representations of counsel for the appellants, the only change of policy effected by the repeal of the 1946 Act was with respect to sales consummated *subsequent* to June 30, 1947. Cf. *United States v. Fortier*, 342 U.S. 160.

As the Supreme Court has said of 1 U.S.C. 109:

"By the General Savings Statute Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the statute itself:

'and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.'

We see no reason why a careful provision of Congress keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose."

De La Rama S.S. Co. v. United States, 344 U.S. 386. Accord, see *United States v. McNair*, 180 F. 2d 273 (C.A.

1 Although appellants' first argument is denominated "The amended complaint herein does not state a cause of action in either of the counts pleaded," the argument thereunder is confined to the narrow contention that appellee's claim is defeated by the repeal of the Veterans' Emergency Housing Act of 1947. The Government's reply is accordingly similarly limited in scope. As a practical matter, the same argument was advanced by appellants in connection with their objections to Master's Report (Tr. 172 et seq.) and answered appellee. By accepting and approving the findings and conclusions of the Special Master (Tr. 208) in the face of appellants' brief, the district court has rejected the argument presented by appellants.

9) decided by the United States Court of Appeals for this Circuit. The same savings statute has been applied with the same results in respect to causes of action which accrued under the provisions of the Veterans' Emergency Housing Act of 1946 and prior to its repeal.² *United States v. Carter*, 171 F. 2d 530 (C.A. 5); *Rheinberger v. Reiling*, 89 F. Supp. 598, 601 (D. Minn.); and see *United States v. Fortier*, 342 U.S. 160, Footnote 3.

The presence of a savings clause in the statute which repealed the Veterans' Emergency Housing Act (see Page 7 of appellants' brief) does not serve to render the general savings statute (1 U.S.C. 109) inapplicable.³ Speaking of the savings provision quoted by appellants, the court in *United States v. Carter*, 171 F. 2d 530, 532 (C.A. 5) said:

"We interpret the foregoing language to be an expression of the intent of Congress to retain in full force and effect all orders, commitments, regulations, and remedies relating to veterans' housing which have accrued prior to the date of the 1947 Act. At any rate,

2 Dictum quoted from *Sedivy v. Superior Home Builders*, 188 F. 2d 729 (C.A. 7) cannot help appellants in the face of the terms of the general saving statute and the foregoing authorities. *Sedivy* does not consider these and involves an entirely different question, viz., the limitation which is clearly inapplicable in an action by the Government such as in the instant case. *United States v. See*, 194 F. 2d 100 (C.A. 9) and cases cited therein. Appellants' reliance upon dictum in *Woods v. Richman*, 174 F. 2d 614 (C.A. 9) is similarly misplaced. No consideration was there given to the saving statute. The more recent decision of the same court in *United States v. McNair*, 180 F. 2d 273 (C.A. 9) dispels any doubt as to the result that should be reached in view of the applicable saving statute.

3 The district court decision of *Wilmington Trust Co. v. United States*, 28 F. 2d 205 (D. Del.) cited by appellants in fact turns upon the court's conclusion that the tax in dispute had not accrued upon the date on which the Tax Act was repealed. There is no question but that liability had accrued under the facts of the instant case prior to the repeal of the applicable statute. The *Wilmington Trust Co.* case has in fact been discredited even upon the proposition upon which it was decided. See *Schoenheit v. Lucas*, 44 F. 2d 476, 490 (C.A. 4); *Burrows v. United States*, 56 F. 2d 465. (Ct. Cls.).

the foregoing language is the antithesis of the express language that Section 109 requires of a statute in order to repeal pre-existing remedies."

As 1 U.S.C. 109 provides "The repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so *expressly* provide * * * ." (Italics added.) Cf. *Fleming v. Mohawk Co.*, 331 U.S. 111, Footnote 11. There is no such provision in the Housing and Rent Act of 1947, 61 Stat. 193.

Section 1(b) of the Veterans' Emergency Housing Act of 1946 reads:

The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier."

And there was also incorporated in said 1946 Act the following:

"Section 5. * * * Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

The foregoing parts of the 1946 Act provide additional evidence that the intention of Congress was to have the legal remedies continue in force. Specific, direct and unequivocal language in the repeal statute was then manda-

tory to defeat the applicability of 1 U.S.C. § 109 above quoted. The so-called repealing Act (Housing and Rent Act of 1947, *supra*) does not "so expressly provide" as required to give appellants' argument any weight whatever.

In a case where the same contention obviously was urged by defendants under a similar action brought by a purchaser to recover overcharges, after quoting the saving clause in the repealing Act (Housing and Rent Act of 1947), the Court said:

"I am of the opinion that this saving clause in the repealing of the statute is not so plainly in conflict with the general rule of statutory construction established by Title 1 U.S.C.A. 109 as to make that Section (109) inapplicable. The statutory rule of construction there provided is that the repeal of a statute shall not have effect to release or extinguish a liability incurred under such statute unless the repealing act shall so expressly provide. There is no such provision in the Act of June 30, 1947, and it follows that the Act of May 22, 1946, 'shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.' (Sec. 109)." *Pruitt v. Litman*, E.D. Pa. 1949, 89 F. Supp. 705, 706.

From the foregoing, it is clear that repeal of the Veterans' Emergency Housing Act did not have the effect of forgiving all prior violations *nunc pro tunc*.

III.

DEFENDANTS ARE LIABLE FOR THE SPECIAL ASSESSMENTS.

In the district court's decision of July 30, 1951, (Tr. 121-127) it was stated, "This court decided on the de-

fendants' motion to dismiss that the maximum price established under the provisions of Priorities Regulation 33 *must* include the land upon which the dwelling is situated and *all* improvements." (Italics added.) Cf. Priorities Regulation 33 quoted in part at Pages 18 and 19 of appellants' brief. The thrust of their second argument is aimed at excluding items for which special assessments have been levied from the meaning of the term improvements. In setting up this argument, counsel has attempted to draw a distinction without in fact showing that there is a difference. This is clearly demonstrated by the facts of the instant case.

The plans and specifications filed by appellants for the purpose of obtaining priorities assistance at first called for the installation of septic tanks, an *improvement* for which special assessments are not made. The authorized maximum price was established for the dwellings in the development undertaken by the appellants on the basis of the plans and specifications submitted which included the septic tanks. Thereafter the plans were changed to substitute sewers for septic tanks. The appellants would now have the court believe that a sewer is not an improvement which they were required to furnish with the dwellings constructed by them with priorities assistance for a designated maximum price although, under their definition of improvements, a septic tank is an improvement which was to be furnished within the maximum price authorized. No exercise in semantics can justify so flagrant a disregard of the realities of the situation. The regulation speaks of "*all* improvements," not just those which could not be

installed and paid for through public improvement projects and special assessments.⁴

It requires no citation of authority to establish that where the words of a statute or regulation are clear on their face there is no need to resort to the so-called aids of construction, as appellants have done in their brief. The conduct of the parties, the facts recited in the district court's opinion of July 30, 1951, the matters placed in evidence in the hearing before the Special Master, and the reasons stated in the findings, conclusions and decision herein appealed, all point irresistably to the conclusion that the items covered by special assessments were to have been furnished by the defendants without charge in excess of the maximum price established for the dwellings. Substance and not form controls equitable proceedings. Appellants cannot by the expedient of organizing a special improvement district (1) escape their obligation to the purchasers of the dwellings, and (2) avoid the maximum price restrictions imposed under the priorities assistance program. The appellants are liable for the special assess-

4 As a practical matter, regulations were promulgated to implement Priorities Regulation 33 by establishing certain minimum requirements and significantly these regulations provided that:

The "HH Minimum Property Requirements" shall be the same as the "Property Standards," "Minimum Construction Requirements," and "Minimum Requirements for Rental Housing," as established for the area and amended from time to time by the Federal Housing Administration under the National Housing Act insofar as they apply to the structure itself and its *water supply* and *sewage disposal systems*, or as modified by rulings or standards issued by the National Housing Agency on special methods of construction or substitute materials.

24 C.F.R., 1946 Supp. 707.16. Specific reference to sewage disposal systems in this regulation makes it clear that such items were within the contemplation of the regulation and undoubtedly intended to be included within the term "all improvements."

ments and the plaintiff is entitled to the relief prayed for in its complaint.

The fortuitous circumstance by which the lien for the special assessment attached to the property subsequent to the date of the warranty deed given therefor by defendants cannot relieve them of responsibility. As this court observed in its opinion of July 30, 1951: (Tr. 124)

"It appears from the application for mortgage insurance there would be no indebtedness other than the mortgage loan applied for, which would indicate to the Federal Housing Administration and the bank in question that the purchasers of the dwellings under the project would have no special improvement tax assessed against their property; also to the same effect the answers of defendants Hartwig under item No. 7 of the sub-division Information Form submitted to Federal Housing Administration for the issuance of mortgage insurance, in which he said that purchasers of the dwellings would be required to pay no special assessments, and that all contemplated street and utility improvements to be installed by developer were included in sale price."

"The liability for the lien is there as soon as the improvement is made (*Dougherty v. Miller*, 36 Cal. 83)," *Swords v. Simineo*, 68 M. 164, 216 P. 806.

This is clearly a case in which equity should order done that which ought to have been done initially by the defendants.

IV.

APPELLANTS ARE RESPONSIBLE FOR CONSTRUCTION DEFICIENCIES AND OMISSIONS WHICH RESULTED IN UNAUTHORIZED OVERCHARGES TO THE PURCHASERS.

The facts of this case amply demonstrate that the appellants are responsible for construction deficiencies and omissions which resulted in substantial overcharges as indicated in the report of the Special Master. Appellants seek to excuse these defects and omissions and avoid the necessity of making restitution therefor by relying upon a compliance inspection report of the Federal Housing Administration. Appellants' Brief (see Pages 23 and 24) itself indicates that the report is dated October 23, 1947, a date nearly four months *subsequent* to the repeal of the Veterans' Emergency Housing Act; that the report bears the certificate of the chief underwriter of the Federal Housing Administration; that the underwriter indicated on the report that a firm commitment had been made by Federal Housing Administration; and that closing papers might be submitted under these circumstances all point positively to the fact that the purpose of the inspection report at that late date was to secure Federal Housing Administration insurance for the benefit of the builder.

Even if the inspection report is considered to indicate acquiescence in deviations from the plans and specifications filed by the appellants with their application for priorities assistance, it is manifest the Government cannot be held to be bound thereby. As amended (see 11 F.R. 4085), Priorities Regulation 33(3) requires that:

"A builder who constructs, converts, alters or repairs housing accommodations under this regulation must do the work in accordance with the description given in the application, except where he has obtained *written approval* for a change from the agency which approved the original application." (Italics added.)

Cf. *United States v. Austin*, 100 F. Supp. 33, 42 (D. Md.). The written approval contemplated by the regulation was to be given by the Federal Housing Administration office to which the original application was submitted *upon application therefor by the builder*. Inspectors were, of course, bound to observe the terms of the regulation and see that the work was done in accordance with plans and specifications and were not authorized to sanction that which the regulation prohibited.

In administering the priorities assistance program, the Government was acting in a sovereign capacity and so acting it could not be bound by the unauthorized acts of agents who approved construction which did not in fact comply with approved plans and specifications and minimum construction requirements. *Filor v. United States*, 9 Wall. 45; *Utah Power & Light Co. v. United States*, 243 U.S. 389; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380; *Bank of Arizona v. United States*, 73 F. 2d 811 (C.A. 9); and see the opinion of this court filed herein on July 30, 1951 (Tr. 121-125). Anyone dealing "with the government takes the risk of having ascertained that he who purports to act for the government stays within the bounds of his authority." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380.

Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned

to the detriment and injury of the public. *Whiteside v. United States*, 93 U.S. 247, 257.

If appellants desired to make substitutions or changes in the plans and specifications upon the basis of which the maximum prices were established, it was their duty to make application to the office in which these plans and specifications were filed at the time the changes were desired.

Appellants' suggestion that every completed inspection report is a formal "judgment" of binding force upon the Government ignores the realities of Government operations. Nor can it be squared with the authorities cited in the preceding paragraph. Moreover, the functions conferred by the Veterans' Emergency Housing Act are expressly exempted from the coverage of the Administrative Procedure Act. 5 U.S.C. 1001.

CONCLUSIONS

1. Based upon the evidence and the law the district court's findings, conclusions and decision and its judgment are not clearly erroneous, but rather substantially supported.

2. The appellee's cause of action was not defeated by the repeal of the Veterans' Emergency Housing Act of 1946, *supra*, or for any other reason.

3. The special improvement charges were represented to the purchasers to be included in the maximum sales price, and in fact were charged to and paid by said purchasers in excess of the maximum sales price. Further, one of the price increases was based upon additional costs of installing a public sewer rather than a septic tank, and

the Federal Housing Administration understood the special improvement charges would be included in the maximum sales price.

4. The deviations in the construction of the houses were not approved by the Federal Housing Administration prior to the sale of each house, or at all, in the manner contemplated by the regulations, and any so-called approval by a representative of the Federal Housing Administration was without authority to bind the Government under its priorities program. Approval for any other purpose is not material.

Finally, it is urged that the evidence and the law require the lower court's findings, conclusions and decision and its judgment be affirmed.

Respectfully submitted,

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No. 15,145

**United States
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A. W. HARTWIG and JEFF TINGLE,

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vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellants

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TABLE OF AUTHORITIES CITED

Cases

	Pages
Conn vs. Board of Commrs. (Ind.) 51 N.E. 1062.....	6
Ginsberg & Sons vs. Joseph Popkin, 285 U.S. 204 76 L.Ed. 704	7
Great Northern Railway Co. vs. United States, 208 U.S. 452, 52 L.Ed. 567	3
Hertz vs. Woodman et al., 218 U.S. 205, 54 L.Ed. 1001.....	3
State of California vs. Deseret Water, Oil & Irrigation Co., 243 U.S. 415, 61 L.Ed. 821	7
United States of America vs. Robert Fortier et al., 342 U.S. 160, 96 L.Ed. 179	9
United States vs. Carter, 171 F. (2d) 530	4
United States vs. McNair, 180 F. (2d) 273	5

Texts

82 C.J.S., Statutes, page 694 et seq.	7
80 Am. Jur., Statutes, par. 358	7

United States Court of Appeals

For the Ninth Circuit

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vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellants

This reply brief is directed at the contention of the Appellee that the repeal of the Veterans Emergency Housing Act of 1946, by the Housing and Rent Act of 1947, did not extinguish the liability it claims, of the Appellants, under the amended complaint herein. The Appellants now reiterate their contention in their initial brief on this appeal, that the amended complaint herein does not state a cause of action in either of the counts pleaded. And in furtherance of that contention they stand firmly upon the argument made in their initial brief, under Subdivision I thereof, as that argument will be supplemented herein. Furthermore, to epitomize to some extent, the Appellants' supplemental argument submitted herein, their position is that the Appellee, in

its brief, at which this reply brief is directed, has disregarded an applicable and controlling decision of the Supreme Court of the United States, and certain other applicable and settled principles of law, that repudiate Appellee's argument in its entirety.

In the argument in this reply brief there will be some repetition by the Appellants, by quotation, of the language of statutory provisions, mentioned heretofore, that are applicable, to the end that there may be greater clarity on the face of such argument. Thus, in the Housing and Rent Act of 1947, approved June 30, 1947, Congress expressly repealed Sections 1, 2(b) through 9, and Sections 11 and 12, of Public Law 388, Seventy-ninth Congress (the Veterans Emergency Housing Act of 1946) and concluded that piece of legislation as follows:

"Provided, that any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of the Act (June 30th, 1947), with respect to Veterans of World War II, their immediate families, and others, shall remain in full force and effect."

The Appellee stands in its argument herein on the claim, in substance, that, under 1 U.S.C. 109, the afore-said repeal, by Congress, in 1947, of the 1946 statute involved, did not have the effect to release or extinguish any liability incurred under the Veterans Emergency Housing Act of 1946, in that the repealing act does not "so expressly provide." This argument of the Appellee not only disregards the effect of the ruling of the Su-

preme Court of the United States in the case of Hertz vs. Woodman et al., 218 U.S. 205 54 L.Ed. 1001, but it also disregards, contrary to settled law that will be cited later herein, the effect of the above-quoted proviso in the 1947 repealing act.

In the Hertz case, *supra*, the Supreme Court of the United States, speaking through Mr. Justice Lurton, considers the effect of the Act of Congress 1 U.S.C. 109, on which the Appellee relies. After quoting the statute in question, the Supreme Court has the following to say:

"This provision has been upheld by this Court as a rule of construction applicable, when not otherwise provided, as a general saving clause, to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress" (citing cases).

Among the cases cited is that of Great Northern Railway Company vs. United States 208 U.S. 452, 52 L.Ed. 567. The Court then quotes from the Great Northern Railway Company decision as follows, to-wit:

"As the section of the Revised Statute in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics are ours) in a subsequent enactment. But while this is true, the provisions of Section 13 (the statute under consideration) are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced unless, *either by express declaration or necessary implication, arising from the terms of the law as a whole*, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 * * *."

Then, continuing, the Court has the following to say further in the Hertz case, to-wit:—

“The repealing Act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail * * * *. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation * * * * that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, *by plain implication*, cuts down the scope and operation of the general rule in Section 13.”

Before continuing the argument in support of the contention of the Appellants herein, attention is called to the case of the United States vs. Carter, 171 F.2d 530, relied upon by the Appellee as supporting its claim that liabilities, under the Veterans Emergency Housing Act of 1946, remained in effect, so that suit could be brought thereon, after the enactment of the Housing and Rent Act of 1947. In the Carter case (and we say this with entire respect to the court involved) the Court cites and quotes the proviso clause in the Housing and Rent Act of 1947 above quoted herein and, then, in disregard of the plain language of the Supreme Court of the United States in the Hertz case, has the following to say, and we emphasize in italics the language of the court in the Carter case to which we take exception as a result of the ruling made in the Hertz case, to-wit:

“We interpret the foregoing language to be an expression of the intent of Congress to retain in full

force and effect all orders, commitments, regulations, and remedies relating to veterans' housing which had accrued prior to the date of the 1947 Act. At any rate, the foregoing language is the antithesis of *the express language that Section 109 requires* of a statute in order to repeal pre-existing remedies."

Thus, the Court, in the Carter case, has disregarded the plain language of the Supreme Court of the United States, in the Hertz case, that *express language is not required* to take a statute out from under the provisions of 1 U.S.C. 109, but that the repealing statute may operate to extinguish all liabilities under the repealed statute if the repealing Act brings about this result "*by plain implication.*" The Appellants contend (as will be developed in subsequent argument herein) that there is such "plain implication" in the Housing and Rent Act of 1947, and that, accordingly, all liabilities under the 1946 Act were repealed when the 1947 Act was enacted, except only as to the items of liability covered by the saving clause in the 1947 Act, items of liability that do not include the claimed liabilities made the basis, by Appellee, of its amended complaint in the case at bar.

Furthermore, it should be said that this Court, in *United States vs. McNair*, 180 F.2d 273, cited by Appellee, did not consider a saving clause such as is involved here; and in construing 1 U.S.C. 109 this Court merely quoted portions of the decisions, by the Supreme Court, in the Hertz case, and in the previous case of *Great Northern Railway Company vs. United States* 208 U.S. 452, 52 L.Ed. 567, where the Supreme Court of the

United States also laid down the doctrine announced in the Hertz case. In so quoting from the Great Northern Railway Company case, Justice Denman, of this Court, used the language therein of the Supreme Court of the United States to the effect that Section 1 U.S.C. 109 (heretofore referred to herein as Section 13) is not to be given effect where "*either by express declaration or necessary implication, arising from the terms of the law, as a whole*, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13." Thus, this Court has accepted the rule which Appellants contend is applicable in the case at bar.

Appellants contend herein that it appears, *by necessary implication*, from the language of the Housing and Rent Act of 1947, *taken as a whole*, that this repealing act has the effect to release and extinguish the claimed liability under the Veterans Emergency Housing Act of 1946 which the Appellee relies upon, and that, accordingly, its amended complaint herein does not state a cause of action in any of the counts pleaded. In *Conn vs. Board of Commrs. (Ind.)* 51 N.E. 1062 and 1064, the court lays down the established rule that the implication or inference which may arise in the construction of statutes is of something not expressly declared, but *arises out of* that which is directly or expressly declared in the statute.

It is well to note at this point, that it is fundamental and settled law that all parts, provisions or sections of a

statute must be read considered, or construed together, and that each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection, or harmony, with the whole.

82 C.J.S., Statutes, page 694, et seq.

80 Am. Jur., Statutes, paragraph 358.

And in *D. Ginsberg & Sons vs. Joseph Popkin*, 285 U.S. 204, 76 L.Ed. 704, the Supreme Court of the United States says it is a "cardinal rule" that effect shall be given to every clause and part of a statute.

And in *State of California vs. Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415, 61 L.Ed. 821, the Court says:—

"The proviso * * * * is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

In the case at bar the proviso, quoted *supra*, in the 1947 Act, is all important, Appellants submit, in determining whether "by necessary implication" the said 1947 Act extinguishes the liabilities claimed by the Appellee herein. Thus, we point out, first of all, that, without this proviso clause in the Act, then, under U.S.C. 109, *all liabilities* created by the Veterans Emergency Housing Act of 1946, existing at the time of the 1947 repealing Act, would remain in force, including the items of liability covered by the terms of the said proviso. This being the case, why did Congress add the proviso? The answer to this question is clear, we submit, "by necessary implication" that Congress intended *something* by the

enactment of that proviso, and that "*something*" plainly is that the only liabilities not repealed by the 1947 Act should be the liabilities fixed by the terms of the proviso, which terms are plain and entirely clear. This is simply another way of saying that Congress intended, by the proviso, that, subsequent to June 30, 1947, when the Housing and Rent Act was enacted, no liabilities would be enforceable under the 1946 Act that were not comprehended by the language of the proviso in the 1947 Act. It cannot be argued legitimately that the proviso is without effect or that Congress did a nonsensical thing in adopting the proviso. And it will have to be granted that the members of Congress, who passed the 1947 Act, knew the law to be that a straight act of repeal, without more, would keep all liabilities in effect under the repealed act. Members of Congress also knew (for such is also the law) when they added the proviso to the 1947 Act, that effect would have to be given to the terms of that proviso in construing the said Act, as the authorities, *supra*, establish. Thus, giving effect to that proviso, as drawn, and as added to the 1947 Act, the plain implication thereof by Congress is that liabilities shall remain in effect in connection with "allocations made or committed, or priorities granted", etc., before the date of the enactment of the Act of June 30, 1947 (as declared in the proviso) but that otherwise (since there is no other enumeration with respect to liabilities in the proviso) no liabilities under the 1946 Act shall remain in force or effect. Hence, there is legal basis for contending, as the Appellants do,

that 1 U.S.C. 109 has no application whatever in the case at bar and that the claimed liabilities, made the basis of the Government's amended complaint herein, have been extinguished and were not in force or effect when this action was brought. To contend otherwise would have the effect of nullifying the aforesaid proviso.

But apart from the intention of Congress, and the plain implications of the proviso in question, it is important to consider the effect of the 1947 statute (the Housing and Rent Act of that year) upon Priorities Regulation No. 33. The Supreme Court of the United States has decided in *United States of America vs. Robert Fortier et al.* 342 U.S. 160, 96 L.Ed. 179, that *statutory authority* for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, *except only as otherwise provided in the proviso of the Act*, which proviso, of course, does not relate at all to any of the matters in suit here. Therefore, the contention of the Appellants is that there was no basis in law, when the action at bar was brought, for claiming that the liabilities, made the basis of the amended complaint in the action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, *alone, in terms or otherwise*, create the liabilities sued upon in the case at bar. In order to establish those liabilities the Government must stand (as it is doing) not only on the Veterans Emergency Housing Act of 1946 but also on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) sets forth in detail the provisions of law that

create liabilities in the premises; and that statute and the Regulation are submitted now to the Court, without quotation therefrom, to speak for themselves in this connection and to establish the foregoing as a correct statement of fact and of law. Consequently, since Priorities Regulation No. 33 was nullified as aforesaid by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, as the Supreme Court has decided in the Fortier case, *supra*, it follows that there is no basis, in law, for the claims pleaded by the Government in the action at bar. This conclusion is warranted by the fact that 1 U.S.C. 109 does not, in terms or otherwise, have any application to Priorities Regulation No. 33. That statute, 1 U.S.C. 109, *relates only to statutes and not to regulations* issued under a statute, and there is nothing whatever in any act of Congress that provides that a regulation, or liabilities created thereunder, shall remain in effect after the regulation has been nullified by an Act of Congress. This state of the law the Appellee has not mentioned in its brief herein.

Thus, in final conclusion, the Appellants contend that, upon both reason and authority, the judgment rendered in the lower Court is erroneous and that, consequently, it should be reversed with directions to dismiss this action.

Respectfully submitted,

STERLING M. WOOD

Attorney for Appellants

No. 15,145

**United States
Court of Appeals
for the Ninth Circuit**

A. W. HARTWIG and JEFF TINGLE, Appellants,
vs.
UNITED STATES OF AMERICA, Appellee.

Petition for Rehearing

STERLING M. WOOD
Billings, Montana
Attorney for Appellants

FILED

JUN 28 1957

United States Court of Appeals

For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

STERLING M. WOOD

Billings, Montana

Attorney for Appellants

United States
Court of Appeals
For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

The Appellants herein respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of the petition represent to the Court as follows:—

That they reserve the position argued heretofore as to each and all of the points of appeal, but in this petition, and the supporting argument, address themselves solely to the decision herein of May 23, 1957, believing that the Court may be convinced thereby that the result announced in its said decision is based upon the application of incorrect legal principles.

Therefore, this petition, and the argument following the same (which argument is submitted as a part of this petition and is as succinct and brief as possible) are devoted to convincing the Court that it has erred in its principal ruling in its said decision, to the effect that the counts pleaded in the amended complaint herein each

state a cause of action, the said Appellants, through their counsel undersigned, believing, in good faith, that none of the counts so pleaded states a cause of action, and that, accordingly, the Appellee is without legal right in the premises.

WHEREFORE, Petitioners respectfully urge that a rehearing may be granted herein and that the mandate of this Court may be stayed pending the disposition of this petition.

STERLING M. WOOD

Attorney for Appellants

STATE OF MONTANA

COUNTY OF YELLOWSTONE

} ss.

Sterling M. Wood, being first duly sworn, on oath certifies and says:—

That he is the attorney for the Appellants in this action; that he makes this certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

STERLING M. WOOD

Subscribed and sworn to before me this 25th day of June, A. D., 1957.

(SEAL)

ELVA KIRKPATRICK

Notary Public for the State of Montana. Residing at Billings, Montana. My Commission expires July 11, 1958.

ARGUMENT

The position of the Appellants upon this petition for rehearing—a position that is taken with utmost respect for this Court and the members thereof who rendered the decision in the case at bar—is that the Court in its opinion herein, filed May 23, 1957, has erred, under controlling authority, in deciding that, in this action brought October 8, 1948, the United States of America then had the legal right to prosecute the same to judgment against the Appellants.

Before submitting arguments and authority to sustain this position of the Appellants, we shall point out herein that the authorities cited by this Court, on page 6 of its printed opinion herein, do not support its conclusion that the savings clause in the Housing and Rent Act of 1947 does not exclude *by implication* the effect in this case of 1 U.S.C.A., Paragraph 109—the general savings statute. Thus, in *United States vs. Carter et al.*, 171 F. 2d, 530 and 532, the Court said:

“Section 1(a) of the Housing and Rent Act of 1947 repeals Section 53 in part, together with other sections, of the 1946 Act except that it provides that :
 ‘* * * any allocations made or committed or priorities granted for the delivery, or any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.’

“We interpret the foregoing language to be an expression of the intent of Congress to retain in full force and effect all orders, commitments, regulations,

and remedies relating to veterans' housing which had accrued prior to the date of the 1947 Act. At any rate, the foregoing language is the antithesis of the express language that Section 109 requires of a statute in order to repeal pre-existing remedies."

The Court of Appeals for the 5th Circuit, in the Carter case, *supra*, does not mention the rule of "implication" (which Appellants contend is here involved)—a rule that must be considered and applied in the case at bar under the controlling decision of *Great Northern Railway Company vs. United States*, 208 U.S. 452, 52 L.Ed. 567. As a matter of fact, the Court in the Carter case misstates the rule of the *Great Northern Railway Company* case *supra*—a rule which has been upheld and restated by the Supreme Court of the United States in the case of *Hertz vs. Woodman et al.*, 218 U.S. 205, 54 L.Ed. 1001. The following is quoted from the Hertz case for the convenience of this Court, viz:

"The repealing Act here involved includes a saving clause, and if it necessarily, *or by clear implication*, conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, *by plain implication*, cuts down the scope and operation of the general rule in Section 13."

The next case cited by this Court is that of *Pruitt vs. Litman*, 89 F. Supp. 705. There the Pennsylvania Court

refers to the savings clause in the Housing and Rent Act of 1947 and merely says that it is not "so plainly in conflict with the general rule of statutory construction established by Title 1 U.S.C.A., Paragraph 109, as to make that Section 109 inapplicable." The doctrine of "implication" is not even mentioned, and, as a matter of fact, the court leaves the impression—contrary to the law, *supra*—that a repealing Congressional act must "expressly provide" for a repeal in order to effect a repeal.

The next case cited by this Court on page 6 of its printed opinion herein is that of *United States vs. Tyler Corporation*, 90 F.Supp. 395. There the United States District Court in Virginia does no more than rule, and flatly—without argument, or the citation of any authority, or a discussion of the doctrine of "implication"—that the action involved, for claims under the Veterans' Housing Act of 1946, was maintainable, after the expiration of that Act, by virtue of the Federal general savings statute.

The next case cited by this Court, on the page mentioned of its printed opinion, is that of *Rheinberger vs. Reiling*, 89 F.Supp. 598. Here, again, there is not a word in the decision, by way of argument or citation of authority, on the doctrine of "implication," and the Minnesota Federal Court rendering the decision has wholly disregarded the law that, by implication alone, a repealing act can take a case out of, or overcome, the effect of 1 U.S.C.A., Paragraph 109.

The next citation by this Court, on the aforesaid page

of its printed opinion, is hardly an authority, consisting, as it does, of a mere footnote by an undisclosed editor. But, after all, this editor predicates his stated conclusion on the Carter case, *supra*, which, as set forth above, stands discredited as an authority in the case at bar.

Thus, the decisions above mentioned, which this Court has cited and relied upon, do not sustain its decision herein.

A fairly recent case—decided in 1956—and which has not been questioned in any later decision we have found, sets forth clearly, with supporting authorities that are controlling, some of the principles upon which the Appellants rely to fully justify this petition for rehearing. Consequently, in the effort to be succinct, and helpful to this Court, without taking the time, on this petition for rehearing, to make extended research, but, nevertheless, pointing out controlling authority that is applicable herein, we shall now quote from the case referred to, which is that of *Territory of Alaska vs. American Can Co., et al.*, 137 F.Supp., 181. Thus:—

“It is a fundamental rule of statutory construction that a general saving clause or statute preserves rights and liabilities which have accrued under the act repealed and that they operate to make applicable in designated situations the law as it existed before the repeal, *unless such application is negatived by the express terms or clear implication of a particular repealing act*, or where not otherwise provided by the repealing act. And, where there are express savings clauses in repealing statutes which are later in time, constituting the express will of the Legislature, such have been taken as an indication of legislative intent

to save nothing else from the repeal, and the general saving statute in force in the state does not apply. 82 C.J.S., Statutes, Par. 440, p. 1014; 50 Am. Jur., Statutes, 534-5, Secs. 527-528; *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567; *Wilmington Trust Co. v. United States*, D.C., 8 F. 2d 205; *United States v. Chicago, St. P., M. & O. Ry. Co.*, D.C., 151 F. 84; *United States v. Standard Oil Co.*, D.C., 148 F. 719.

"In the *Wilmington Trust Co.* case (28 F.2d 207) the District Court of Delaware held that repeal of parts of the Revenue Act of 1918, 40 Stat. 1057, by the Revenue Act of 1921, 42 Stat. 227, which provided that the parts repealed shall remain in force as to "the assessment and collection of all taxes which have accrued" under the previous act, left all of the estate tax provisions of the former statute except those expressly saved by the act 'as completely obliterated and extinguished * * * as if the repeal had been absolute and unqualified', since the saving clause kept alive the repealed parts of the earlier act for collection of only those taxes 'accrued' under the earlier act, and saves to the government only such previously accrued taxes. In this case the general Federal savings clause, R.S. Sec. 13, 1 U.S.C.A., Sec. 29, was relied upon to show that the liability of the tax was not destroyed by the repeal of the statute. Upon this point the opinion states:

" 'Of this statute the court, in *Great Northern Railroad Co. v. United States*, 208 U.S. 452, 28 S. Ct. 313, 52 L.Ed. 567, said: As it "has only the force of a statute, its provisions cannot justify a disregard of the will of Congress *as manifested, either expressly or by necessary implication*, in a subsequent enactment." As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others. To enlarge the exceptions by adding the provisions of Section 13 of the Revised Statutes thereto, or, more accurately stated, to add to

the saving clause of the repealing statute the provisions of R.S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be a plain disregard of the will of Congress as manifested in the repealing act.' * * * *

"There is another fundamental rule of statutory construction which must be considered in this connection, and that is the rule of 'expressio unius est exclusio alterius'—the mention of one is the exclusion of others—which requires a holding that the Legislature intended to save the taxes specifically mentioned in the repealing act and to exclude all others. Sutherland on Statutory Construction, 3rd Ed. Vol. 2, p. 412, Sec. 4915; p. 416, Sec. 4916; *Jones v. H. D. & J. K. Crosswell, Inc.*, 4 Cir., 60 F.2d 827; *Rybolt v. Jarrett*, 4 Cir., 112 F.2d 642; *Territory ex rel. Sulzer v. Canvassing Board*, 5 Alaska 602, at page 622.

"A decision of the Supreme Court of Kansas in the case of *State v. Showers*, 34 Kan. 69, 8 P. 474, 476, is especially in point, as it relates to a state saving clause as distinguished from the Federal saving clause. In that case the Court was considering the effect of a general saving statute identical with the Alaska statute, as against a later specific savings proviso contained in a repealing act. The opinion of the Court states as follows:

" 'The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.*'

"The opinion also points out that if the special saving clause in the repealing act was not intended to

cover the entire ground and to substitute for the general savings statute, then it 'has no office to perform,' for the general saving clause would save all that it saves and very much more."

In connection with the foregoing, and also with respect to subsequent argument herein, it must be borne in mind, as the Supreme Court of the United States has held in *United States of America vs. Harold T. Lindsay et al.*, 346 U.S. 568, 98 L.Ed. 300, that:—

"Congress has unquestioned power to bar recovery on claims of the Federal Government if it sees fit."

Based upon these settled rules, laid down by controlling authority, Appellants contend primarily that it appears, *by necessary implication*, from the language of the Housing and Rent Act of 1947, *taken as a whole*, that this repealing act has the effect to release and extinguish the claimed liability under the Veterans' Emergency Housing Act of 1946, which the Appellee relies upon, and that, accordingly, its amended complaint herein does not state a cause of action in any of the counts pleaded. It should be noted that in *Conn vs. Board of Commissioners (Ind.)* 51 N.E. 1062 and 1064, the court lays down the well established rule that the *implication or inference* which may arise in the construction of statutes is something not expressly declared but *arises out of* that which is directly or expressly declared in the statute.

Thus, this Court has not supported, with any authority, its stated conclusion on page 6 of the printed opinion herein—that the saving clause in the 1947 Act does not *exclude by implication* the effect of the Federal general

saving statute.

Further, it is fundamental and settled law that all parts, divisions or sections of a statute must be read, considered, and construed together, in construing and applying the statute, and that each must be considered with respect to, or in the light of, all the other provisions or sections and construed in connection, or harmony, with the whole.

82 C.J.S., Statutes, page 694, et seq.

80 Am. Jur., Statutes, paragraph 358.

And in *D. Ginsberg & Sons vs. Joseph Popkin*, 285 U. S. 204, 76 L.Ed. 704, the Supreme Court of the United States says it is a "cardinal rule" that effect shall be given to every clause and part of a statute.

And in *State of California vs. Deseret Water, Oil and Irrigation Co.*, 243 U.S. 415, 61 L.Ed. 821, the Court says:—

"The proviso * * * * is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

Thus, the proviso in the 1947 Act is all important and must be considered carefully in determining whether "by necessary implication" it has the "effect" of extinguishing the liabilities claimed by the Appellee herein. Hence we point out, first of all, that without this proviso clause in the Act, then, under 1 U.S.C.A. 109, *all liabilities* created by the Veterans' Emergency Housing Act of 1946, existing at the time of the 1947 repealing Act, would remain in force, including the items of liability covered

by the terms of the said proviso. But Congress intended *something* by the enactment of that proviso. It—the proviso—“must be given some effect.” The only sensible conclusion possible is that Congress intended by the 1947 Act and implied by the proviso therein, that, subsequent to June 30, 1947, when the Housing and Rent Act was enacted, no liabilities would be enforceable under the 1946 Act that were not comprehended by the terms of the proviso in the 1947 Act. It cannot be argued, legally, that the proviso is without effect or that Congress did a nonsensical thing in placing it in the 1947 Act. Thus, giving effect to that proviso, as drawn, and as added to the 1947 Act, the plain implication thereof by Congress is that liabilities shall remain in effect in connection with “allocations made or committed, or priorities granted,” etc., before the date of the enactment of the Act of June 30, 1947 (as declared in the proviso) but that in other respects the savings statute should be without effect. Hence, there is a legal basis for contending, as the Appellants do, that 1 U.S.C.A. 109 has no application whatever in the case at bar, and that the claimed liabilities made the basis of the action at bar were extinguished by the said 1947 Act and were not in force or effect when this action was brought. To contend to the contrary would, contrary to law, nullify the proviso.

But apart from the intent of Congress, and the plain *implications* of the proviso in question, it is important to consider the effect of the 1947 statute (the Housing and Rent Act of that year) upon Priorities Regulation No.

33, and the legal importance of the Regulation as a basis for the action at bar. The Supreme Court of the United States has decided in *United States of America vs. Robert Fortier et al.* 342 U.S. 160, 96 L.Ed. 179, that *statutory authority* for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, *except only as otherwise provided in the proviso of the Act*, which proviso, by its plain terms, does not relate at all to any of the matters in suit here.

It is also important to note the ruling of the United States Court of Appeals of the 7th Circuit in the Sedivy case (188 F.2nd, 729) which this Court has mentioned on page 6 of its printed opinion, and which ruling is not dictum. Paragraph 5 of the syllabus of that case reads as follows:

"Priorities Regulation 33 providing that no person may sell any dwelling built under regulation to Veterans for more than approved maximum sales price, was repealed by the Housing and Rent Act of 1947."

Therefore, the further contention of the Appellants herein is that there was no basis in law, when the action at bar was brought, for claiming that the alleged liabilities, made the basis of the amended complaint in this action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, *alone, in terms or otherwise*, create the liabilities sued upon in the case at bar. In order to establish those liabilities the Government must stand (as it is doing in its pleading herein) not only

on the Veterans' Emergency Housing Act of 1946 but also, and primarily, on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) alone sets forth the provisions that create the alleged liabilities herein, made the basis of suit. The said 1946 Act and the Regulation are submitted to the Court, without quotations therefrom, to speak for themselves in this connection and to establish the foregoing as a correct statement of fact and of the law. Thus, since Priorities Regulation No. 33 was repealed and nullified by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, it follows that there is no basis, in law, for the claims pleaded in 1948 by the Government in the action at bar; and this Court has plainly erred in its rulings in that connection herein. This conclusion is confirmed by the further fact that 1 U.S.C.A. 109, *relates only to statutes, and not to regulations issued under a statute*; and there is nothing whatever in any act of Congress providing that a regulation, or liabilities created thereby, shall remain in effect after the regulation has been repealed and nullified by Act of Congress.

One further claim of error in the Court's opinion herein will be made briefly.

Assuming, *for the sake of argument only*, that Priorities Regulation 33 is effective herein, then, we submit, the Court erred in holding that Section 944.54(e) thereof requires *written* approval for changes in plans from those specified in the original application. This portion of the said regulation reads as follows:—

“Construction of a project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application.”

Furthermore, the Supreme Court of the United States in *Belcher et al. vs. Linn*, 24 How. 508, 16 L.Ed. 754, said:

“When power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are, in general, binding and valid as to the subject matter.”

Thus, Exhibit 20 herein, a “Compliance Inspection Report,” in which the public officers in charge certified, “Building Improvements Acceptably Completed” and “Closing papers may be submitted,” is binding and valid; and this Court erred in holding otherwise.

Respectfully submitted.

STERLING M. WOOD

Attorney for Appellants

No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,
LOUIS GLEN BALLARD.

THOMAS WHELAN,

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Louis Glen Ballard.*

FILED

FEB 13 1957

PAUL P. O'BRIEN, CL

TOPICAL INDEX

	PAGE
Argument	1
I.	
Appellant Ballard could not lawfully be indicted for nor convicted of violations of United States Code, Title 18, Section 545, nor of conspiracy to violate said section, on allegations and evidence showing that the objects, the importation of which were involved were psittacine birds.....	1
II.	
The dignity of the United States Government will not permit the conviction of any person on tainted testimony.....	3
III.	
The motion of appellant for a bill of particulars as to Counts IV, V and VI should have been granted.....	5
IV.	
Appellant made a timely motion for a severance from his co-defendants which was denied, and appellant was substantially prejudiced and deprived of a fair trial by reason thereof	7
V.	
Ballard deprived of his constitutional right.....	15
VI.	
The court erred in one material instruction prejudicial to Ballard	16
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES	PAGE
Berra v. United States, 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685	1
Castellani v. United States, 64 F. 2d 636.....	10
Falgout v. United States, 279 Fed. 513.....	16
Fishwick v. United States, 329 U. S. 211, 67 S. Ct. 224.....	6
McElroy v. United States, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355	11
Mesarosh v. United States, 77 Sup. Ct. 1 et seq. (Oct. Term, 1956)	3
Opper v. United States, 348 U. S. 84.....	7
Pointer's Case, 151 U. S. 376, 14 S. Ct. 410, 38 L. Ed. 208.....	11
United States v. Perlstein, 120 F. 2d 276.....	11

STATUTE

United States Constitution, Fifth Amendment.....	15
--	----

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,
LOUIS GLEN BALLARD.

ARGUMENT.

I.

Appellant Ballard Could Not Lawfully Be Indicted for
nor Convicted of Violations of United States Code,
Title 18, Section 545, nor of Conspiracy to Violate
Said Section, on Allegations and Evidence Showing
That the Objects, the Importation of Which
Were Involved, Were Psittacine Birds.

Ballard refers to his opening brief—and adopts the
following language from the Reply Brief of Appellant,
Vic Buono:

“* * * When one smuggles psittacine birds, Congress
intended he should be prosecuted under the laws re-

lating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

“It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131; 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men.”

II.

**The Dignity of the United States Government Will
Not Permit the Conviction of Any Person on
Tainted Testimony.**

Ballard points out in his opening brief that all of the witnesses called by the Government in its case in chief were either convicted of smuggling, conspiracy to smuggle or admitted such illegal participation, except for the witness 'Thomas E. Johnson. Johnson did not testify to any matter that would justify the verdict as to Counts IV, V or VI (Appellants' Br. p. 7).

The Government in its brief at page 3 admits this situation, but states:

“There follows a résumé of the testimony adduced which it is established must be interpreted in a manner most favorable to the Government.”

In *Mesarosh v. United States of America*, Vol. 77, Sup. Ct. Rep., page 1, *et seq.* (Oct. Term, 1956), where a Government witness who had testified against Petitioners and who had given what was deemed false testimony before a Senate Committee, the Supreme Court, speaking through the Chief Justice, said:

“The dignity of the United States Government will not permit the conviction of any person on tainted testimony” (p. 5); and

“(6) Massei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not

polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

“ ‘The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608; 87 L. Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.’ *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124, 76 S. Ct. 663, 668.

“(7) The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial.”

The evidence of Hadzima, Spicuzza, Todd, Curtis, Helm, and Ascani leaves no room for conjecture but that they expected favorable consideration from the Government as a result of their giving their testimony on behalf of the Government.

All of such witnesses who had testified in their own behalf on questions involved in this case admitted that in previous trials they had given testimony contrary to their testimony in the present case.

The conviction of Ballard in this case as to Counts IV, V and VI resulted from tainted testimony.

III.

The Motion of Appellant for a Bill of Particulars as to Counts IV, V and VI Should Have Been Granted.

The Government in its Brief (pp. 102 to 105), in reply to this contention, simply states that the granting of a Bill of Particulars is discretionary with the trial court and that the only reason that Ballard demanded a Bill of Particulars was to ascertain the Government's case, and that under the circumstances it was proper to refuse Ballard's demand for a Bill of Particulars.

From the Indictment which charges a conspiracy in Count IV, between April, 1953, and continuing to December, 1954, etc., how could Ballard have known that the Government would call Deputy Sheriff Johnson of San Diego County to show that Ballard was in February of 1953 in possession of a truck in San Diego County, which truck contained Parakeets; how could Ballard have known that the Government would introduce evidence from Hadzima that from July of 1953 until late in 1954 he (Hadzima) and Ballard engaged in the smuggling of psittacine birds, sharing the proceeds 45 per cent each and giving Appellant, Clifford L. Duke, Jr., 10 per cent thereof—*especially when the last overt act charged in Count IV was on a date in June of 1953.*

Further, this last mentioned evidence related to a separate conspiracy different from that charged in Count IV.

The Government refers to this last mentioned evidence in its brief, pages 9 and 10.

Ballard, prior to the time that the Government made its opening statement, objected to any statement of proof to

be adduced in support of Count IV of the indictment which occurred prior to the date of the conspiracy charged in Count IV of the indictment, and also that which occurred after the date of the last overt act charged in Count IV of the indictment [Tr. 48-52, and Appx. 134-138], citing *Fishwick v. United States*, 329 U. S. 211, 67 S. Ct. 224.

Proper objection was made by Ballard in each instance as the evidence was offered and by the Court overruled.

The Government in its brief (p. 103) cites cases in support of a rule of law, which Ballard concedes:

“The proper function of a bill of particulars is two-fold, to state facts beyond those alleged in the indictment (1) so that the offense involved is sufficiently identified to enable the defendant to plead a conviction or acquittal thereon in bar of a possible second prosecution for the same offense; and (2) so that the defendant is sufficiently advised of the charge to enable him to prepare his defense and not to be surprised at the trial.”

If the Government's theory as to Counts IV and VII in arguing its case against Buono is correct—that is, separate conspiracies because purpose of participants different and having different members in the alleged conspiracy—then can it be said that appellant Ballard could not as of this date be indicted and prosecuted for a separate conspiracy with Duke as his co-defendant and Hadzima as an unindicted co-conspirator, the conspiracy extending from July, 1953, to December, 1954, and the object of the conspiracy, the unlawful smuggling of psittacine birds between those dates, etc.

Therefore, Ballard was entitled to a Bill of Particulars not only to enable him to prepare his defense, but also to enable him to plead a former conviction or acquittal in bar of a possible prosecution for an independent and separate conspiracy.

By the Government's own testimony he was entitled to the Bill of Particulars he sought.

IV.

Appellant Made a Timely Motion for a Severance From His Co-defendants Which Was Denied, and Appellant Was Substantially Prejudiced and Deprived of a Fair Trial by Reason Thereof.

The Government replies to this claim and contention by stating that the matter of a severance is a question entirely within the Court's discretion, and to be reviewed only when there appears to be an abuse of that discretion.

The Government in its Brief (p. 108), cites *Opper v. United States* (1954), 348 U. S. 84 at 94, and emphasizes a quote from the decision as follows:

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled
* * *."

As the Government states the abstract principles of law appellant Ballard is in accord. In this case, however, *there is something in the record to indicate an abuse of discretion* when Ballard's motion for severance was overruled.

In the Government's Brief, pages 56 and 57, there is set forth a quotation from the appendix, pages 12 and 14

thereof, wherein Appellant Duke was quoted, from the record at the time of arraignment as saying that he had proof to show that certain individuals, including labor leaders and their attorneys, customs officers and members of the United States Attorney's office had entered into a conspiracy to obstruct justice by procuring false evidence to have him falsely indicted by the Grand Jury; that he wanted an early trial for the purpose of proving these matters.

These statements were made on June 3, 1955, in open court at the time of arraignment in Case No. 25276, the pending case and Case No. 25277 where Mr. Duke alone was a defendant (Appx. pp. 3-19).

After the making of these statements in open court before the Honorable Jacob Weinberger, Judge, everyone knew that there would be a dog fight, with the Government seeking to prove its charges and Appellant Duke seeking to prove that the charges were erroneously brought and by whom inspired.

Ballard filed his Notice of Motion to Move for a severance on June 15, 1955 (Appx. pp. 43-44). This motion for severance was heard and denied by the same Judge Weinberger, who had heard Mr. Duke's earlier statements (Appx. pp. 44 and 52-58).

To require Ballard to stand trial with Duke when it appeared, as it did, that the case would be tried in an atmosphere of prejudice and bitterness certainly indicated an abuse of discretion on the part of the judge who overruled the motion for severance; that the situation which developed should have been foreseen is borne out by the record, and appears affirmatively from the briefs of both Duke

and the Government. Throughout the trial there were discussions of what Judge Tolin referred to as Mr. Duke's special defense.

Every argument advanced by Duke tending to show that Duke did not receive a fair trial could be advanced by Ballard, as tending to prove that Ballard was prejudiced by being forced to trial with Appellant Duke. This is true, even as to the arguments that developed during the course of the trial over Duke's right to represent himself because of the difference of opinion that developed between Mr. Fitzgerald, who was attorney of record for Mr. Duke, and Mr. Duke and the discussion of the propriety of introducing certain evidence offered by Mr. Duke. Indeed, some of these discussions took place in the presence of the jury and resulted in the matter complained of by Ballard in his opening brief at pages 27-29. These matters were also discussed and referred to by the Government in its brief, pages 59-65. Appellant Ballard quotes from the Government's Brief, at page 64, as follows:

"See also Tr. 4296-4297. From the foregoing it is clear that throughout the trial appellant Duke consistently adhered to, and acquiesced in, this theory of 'frame up,' 'conspiracy,' or if you will, his 'special defense.' At his instance, and with his tacit approval, the Court followed this theory and admitted evidence, otherwise inadmissible, for the purpose of proving that Duke was the victim of a frame up, or at least an attempt to convict him upon perjured evidence."

It is significant to note that the court, after one of these long discussions with Mr. Duke, as a practical proposition, tried to make Mr. Ballard take sides, either with Mr.

Duke or against him in connection with his special defense; that the colloquy set forth in Appellant's Opening Brief (pp. 27 and 28) resulted. It is also significant to note that in so far as Counts IV, V and VI are concerned, that the conversations wherein the so-called agreement to high-jack the birds smuggled by Spicuzza and Todd were claimed to have occurred, took place in Buono's office, at a time Buono was present, and participated in the conversations and alleged agreements, and although Duke was convicted on the charge contained in Counts IV, V and VI, Buono was acquitted as to these counts. In other words, the evidence would have as readily supported a conviction of Buono as to Counts IV, V and VI, as it would have supported a conviction against Duke. Because Ballard refused to take sides in the case and refused to disavow Duke's claimed special defense, it is Ballard's contention that the jury took sides against Ballard and found him guilty as to Counts IV, V and VI, but because Buono disavowed Duke's special defense, the jury spontaneously acquitted Buono.

The joint trial, plus the question put to Ballard by the Court, plus the many discussions and arguments concerning Duke's special defense which took place in the presence of the jury, the Court's ruling on the admissibility of evidence in support thereof, together with the Court's comments, the discussion of counsel pertaining to this special defense, plus the argument of the Assistant United States Attorney on Duke's special defense, make the refusal of the Court to grant Ballard a severance error so palpable as to need of no further argument.

In *Castellani v. United States*, 64 F. 2d 636, the defendant, a bank president, was charged jointly with two other

officers of the bank in one indictment, and jointly with one of such officers in another indictment. The two cases were ordered consolidated for trial, and the Court of Appeals held that the individual counts of each indictment must be regarded as separate counts of the consolidated indictment, and that each count constituted a separate and distinct offense, not all provable against the same defendants.

The appellant (Castellani) entered a plea of not guilty as to both indictments. His co-defendants entered a plea of guilty as to certain counts of the indictment in which all three were jointly charged and the co-defendants were used as witnesses for the Government. Appellant was convicted of one count of the second indictment, and acquitted of all other charges.

Citing *Pointer's* case, 151 U. S. 376, at page 403, 14 S. Ct. 410, 412, 38 L. Ed. 208, and *McElroy v. United States*, 164 U. S. 76, at page 80, 17 S. Ct. 31, at 32, 41 L. Ed. 355, and quoting from *McElroy* as follows:

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. * * *"

The Court of Appeals reversed Castellani's conviction and ordered a new trial.

In *United States v. Perlstein*, 120 F. 2d 276, where two attorneys and two bootleggers were jointly indicted in two counts each of which charged all four defendants with conspiracy: (1) To obstruct justice, etc., (2) to carry on a business of distillers without giving bond; where the unlawful distillers were convicted on each count, and the

appellants Perlstein and Paul found guilty on the first count only, the Court of Appeals reversed the conviction as to Perlstein because of evidence improperly introduced against him, and in reversing the conviction of Paul at page 283 says:

“The extent of the prejudice to Paul which resulted from the joint trial cannot now be determined but became obvious in many rulings upon the evidence.”

At the risk of belaboring the point that Ballard was entitled to a severance, we refer to the Government's Brief (pp. 2-11) where a statement of the case is set forth:

First the Government sets forth the claimed evidence with reference to Counts One, Two and Three of the indictment. It shows the witnesses Spicuzza, Todd and Hadzima engaged in the smuggling of psittacine birds on a commercial basis prior to 1952, and before any of the three had ever met Appellant Duke. It is claimed that Appellant Duke first met any of these men at a time in early 1953, when Duke defended a man named Vosburg. It is stated that witness Helm was in the early part of 1953 convicted of smuggling. It is stated that after Vosburg's acquittal there was a meeting in Duke's office between Hadzima, Spicuzza, Todd and Helm concerning the flying of psittacine birds into the United States from Mexico. The plan suggested was that Helm was to fly the birds in for the smugglers and real importers Hadzima, Spicuzza and Todd. Although Helm, Hadzima, Spicuzza and Todd had testified in trials in Federal Court in San Diego concerning the smuggling of psittacine birds (cases in which all but Helm were defendants) following the alleged meetings in early 1953 and before the return

of the indictment in this case, this is the first time that a contention was made that Appellant Duke was a party to any conspiracy.

However, now that the stage is set, the jury properly impressed *and inflamed*, we have what is called the high-jacking conspiracy the subject of Count IV, with related Counts V and VI. This came about because "Honest John" Hadzim thought Spicuzza was stealing from him, therefore he would steal from Spicuzza. The contention was and is that Hadzima planned to steal birds after they had been imported by Spicuzza and Todd. The contention is further made that he arranged with Appellant Ballard and one Purselley to steal birds from others in the United States.

Following the so-called high-jacking incident Counts VII, VIII, IX and X refer to what the Government contends is still another situation with Duke and Buono named as defendants. Ballard not named.

It is respectfully submitted that the consolidation of these charges prejudiced the rights of Ballard.

NOTE: Counts IV and I and VII all have different defendants, and the evidence to support Count I would not support a conviction as to Count IV. It is claimed by the Government that the evidence to support Count VII would not support a conviction as to Count IV, and vice versa.

It is of peculiar significance that the birds claimed to be the subject of the agreement in Count IV, and of the smuggling, possession, etc., of Counts IV and V, were actually smuggled by Spicuzza and Todd as the real par-

ties in interest, and yet neither Spicuzza nor Todd were named as unindicted co-conspirators in Count IV.

Counts IV, I and VII all have different unindicted co-conspirators, that is to say, not all unindicted co-conspirators named in one conspiracy are named in the others.

From the evidence set forth in the Government's Statement of Facts, it is apparent that Ballard was not guilty of conspiracy to smuggle birds (Count IV) or of the actual smuggling (Count V). True, he did nothing to prevent any smuggling, but did not initiate it and played no part in the actual planning to smuggle or the smuggling itself. Ballard, on the evidence, may have been guilty of a robbery, or conspiracy to rob, a kidnapping or of an assault with a deadly weapon or by means of force likely to produce great bodily harm—all violations of state law in California, but not of any Federal offense.

As Ballard points out in his Opening Brief (p. 9), "Whether appellant Ballard lived or died, or was unheard of, Spicuzza and Todd would have smuggled birds." They did smuggle the birds in question.

At page 9 of the Government's Brief, referring to the Desert Center affair the Government in its Statement of Facts recites:

"After binding Spicuzza, Appellant Ballard hit him in the head, etc. Tr. 201, 203, 206, 587, 589" and "Ballard, Purselley and Hadzima then loaded the birds into a truck and returned to Burbank, California, where they transported the birds to an aviary belonging to Mary Ascani."

The Government perhaps stated those as facts in the interest of brevity.

Ballard has no transcript of the testimony but submits that the Transcript quoted by the Government [pp. 201, 203, 206, 583, 585 and 587 and accompanying pages] shows that Ballard occupied himself entirely with Spicuzza and Curtis while Hadzima and Purselley loaded the birds and drove away, leaving Ballard with Spicuzza and Curtis for several hours after Hadzima and Purselley left, and that Hadzima alone delivered the birds to Mary Ascani. Ballard never touched the birds and, unless by his conduct it can be said that he aided and abetted Hadzima and Purselley in a violation of the charge contained in Count VI of the indictment, he could not lawfully be convicted of that Count.

V.

Ballard Deprived of His Constitutional Right.

The Government in its brief argues that the contention of Ballard that he was prejudiced by the Court's intervention with the questions (see Op. Br. pp. 27-28) concerning Ballard's position, and that the conduct of the Court was in violation of the Fifth Amendment to the United States Constitution, was an allegation, and not explained.

A defendant in a criminal case in Federal Court need not urge anything, need not support nor disavow a contention urged by a co-defendant. This seems to be Hornbook law.

VI.

**The Court Erred in One Material Instruction
Prejudicial to Ballard.**

The instruction complained of is set forth in Appellant's Opening Brief, pages 31 and 32.

It is difficult for a jury to forget when the Court gives instructions to tell the jury that it should scrutinize the testimony of a witness called to establish an alibi on behalf of a defendant. In effect, this characterizes such witness more or less as though the witness were an accomplice, whose testimony is by law required to be scrutinized carefully.

An abstract instruction as to the law pertaining to the defense of alibi cannot cure such an admonitory instruction, because the effect of such admonitory instruction is as much as to tell the jury that the testimony of the alibi witnesses is probably untrue.

“The defendant has no burden of proof to sustain as to an alibi, if the proof in relation thereto raises a reasonable doubt as to his guilt, he is entitled to an acquittal.”

Falgout v. United States, 279 Fed. 513.

Conclusion.

For the reasons set forth herein, and in his Opening Brief, Appellant Ballard's convictions on Counts IV, V and VI were the result of error.

Appellant Ballard believes that the evidence was insufficient to justify his conviction, but that because of the prejudice he suffered by being required to stand trial with Appellant Duke, the trial court's action in inviting him to take the position as to whether he stood with Duke or against him with reference to the special defense, coupled with the evidence of claimed brutality on the part of Ballard at the Desert Center incident, resulted in his conviction.

Ballard respectfully submits that under the circumstances of the whole case it was impossible for him to have received a fair and impartial trial and because of the errors complained of he is entitled to a reversal.

Respectfully submitted,

THOMAS WHELAN,

Attorney for Appellant, Louis Glen Ballard.

No. 15146

IN THE

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CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
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Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT,
VIC BUONO.

EDGAR G. LANGFORD,

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TOPICAL INDEX

	PAGE
Argument.....	1
I.	
Appellant Buono could not lawfully be indicted for nor convicted of violations of United States Code, Title 18, Section 545, nor of conspiracy to violate said section, on allegations and evidence showing that the objects the importation of which was involved were psittacine birds.....	1
II.	
Appellant Buono could not lawfully be indicted for nor convicted of the conspiracy purportedly charged in count VII of the indictment, in view of the failure of the government to allege or prove facts which would support the conclusion that such purported conspiracy had any existence separate from the conspiracy charged in Count IV.....	4
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
Berra v. United States, 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685	3
United States v. Witt, 215 F. 2d 580.....	6

STATUTES	
United States Code Annotated, Title 18, Sec. 545.....	1
United States Code Annotated, Title 19, Sec. 1461.....	3
United States Code Annotated, Title 42, Sec. 271a.....	1
United States Constitution, Fifth Amendment.....	3

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REPLY BRIEF ON BEHALF OF APPELLANT,
VIC BUONO.

ARGUMENT.

I.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of Violations of United States Code, Title 18, Section 545, nor of Conspiracy to Violate Said Section, on Allegations and Evidence Showing That the Objects the Importation of Which Was Involved Were Psittacine Birds.

Appellant contends that the importation of psittacine birds into the United States under circumstances presented in the case at bar is not punishable as a felony under Title 18, U. S. C. A., Section 545, but only as a misdemeanor under 42 U. S. C. A., Section 271a. Appellee asserts that appellants may be punished as violators of both sections, and that the Government may elect under which section it will proceed.

The Government's argument seems to require a clarification of appellant Buono's position in certain respects. On page 27 of his brief the United States Attorney suggests that appellant's contentions lead to the absurdity that a government agency may repeal, supersede or modify any specific Congressional enactment at any time by the issuance of a regulation. Such a result would surely be absurd, but it does not follow from appellant Buono's position. Administrative regulations having the effect of law can only be promulgated upon specific authority of Congress. If they are in conflict with Congressional enactments, that is, if they exceed the authority granted by Congress, they are invalid. If the Surgeon General's regulations relating to psittacine birds are in conflict with any Congressional enactment, they are invalid. We doubt that the Government will contend that the regulations are invalid. Appellant Buono's position is that the two statutes are not in conflict, but that, since they are *in pari materia*, they must be construed together, and that the specific must be considered to govern the general. When one finds statutes proscribing murder, manslaughter and battery, one does not ask which statute the legislature enacted first, nor engage in lengthy discussions as to whether the later worked an implied repeal of the earlier. Such matters are only considered as a last resort, when there is no other way to harmonize the respective statutes. It is well understood in the instance cited that the three statutes are construed together, and each is given effect in its proper sphere. When murder is done, the proper prosecution is for murder, not battery or manslaughter, although the defendant probably would not complain, if the charge were brought under either of the other two statutes. So in the case at bar the Surgeon General's regulation and the gen-

eral smuggling statute should be construed together as evidencing a single Congressional intent. When one smuggles psittacine birds, Congress intended he should be prosecuted under the laws relating to psittacine birds. When he smuggles some other commodity, Congress intended he should be prosecuted under the laws relating to that commodity. Common sense makes it clear that Congress did not intend to make both a misdemeanor and felony of the single act of smuggling psittacine birds. It is furthermore clear that Congress did not intend that a psittacine bird smuggler could escape prosecution as a felon by presenting his birds at the border in compliance with 19 U. S. C. A., Section 1461, before smuggling them across the line. Yet such is the absurd result which follows from the reasoning of the Government.

It does not appear necessary at this time to analyze the cases cited by the Government for the proposition that, when two statutes proscribe the same act, the United States Attorney may elect to prosecute under either. It is apparent from a reading of the decision of the Supreme Court of the United States in *Berra v. United States* (1956), 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685, that two members of that Court believe that such a holding is contrary to the Constitution of the United States, and that the majority of the Court, feeling that the question had not been raised in the *Berra* case, expressly left it open (see p. 135). In these circumstances we respectfully submit that the duty devolves upon this Honorable Court to re-examine the above question in the light of the *Berra* decision, of the United States Constitution, Amendment V, and of the fundamental concept that ours is a government of laws and not of men.

II.

Appellant Buono Could Not Lawfully Be Indicted for nor Convicted of the Conspiracy Purportedly Charged in Count VII of the Indictment, in View of the Failure of the Government to Allege or Prove Facts Which Would Support the Conclusion That Such Purported Conspiracy Had Any Existence Separate From the Conspiracy Charged in Count IV.

Appellant Buono contends that he was improperly convicted under count VII of the indictment, because the allegations in that count and the evidence offered thereunder showed no conspiracy separate and distinct from that alleged in count IV, of which appellant Buono was acquitted. Appellee does not dispute Buono's position as to the law, but argues that the evidence in the case at bar shows three separate conspiracies. The Government does not discuss Buono's contention that he had the right to be informed in advance of trial as to the basis upon which the Government would seek to establish that the two conspiracies with which he was charged were separate.

The United States Attorney has set forth the facts in the case at bar in his brief. (Appellee's Br., pp. 2-11.) We submit that upon reading that statement a person of ordinary understanding could only conclude that all the facts relate to but one conspiracy. That conspiracy had as its object the smuggling of psittacine birds into the United States for sale. It commenced when John Hadzima found it necessary to take in a partner to help him in his smuggling business. (Appellee's Br., p. 3.) It continued throughout all the times mentioned in the Government's statement of facts. Past experience indicates that it would be unwise to conclude that it has terminated

yet. The Government's statement indicates that from time to time there were changes of personnel. (Appellee's Br., pp. 4-6.) It also appears that there were disputes over how the proceeds of the smuggling were to be divided and that the various conspirators frequently engaged in the practice of trying to cheat one another. (Appellee's Br., pp. 6-10.) However, the changes of personnel and the attempts to secure a greater share of the profits were always subordinate to the fundamental object of the undertaking—the smuggling of birds.

In spite of the clarity with which the unitary character of the conspiracy appears from the Government's recital of the facts, it argues that the whole can be subdivided into several smaller conspiracies. We turn, therefore, to a consideration of the bases upon which the Government seeks to establish the multiplicity of conspiracies. (Appellee's Br., pp. 112-116.) Of course, appellant Buono is only directly concerned with the matter of whether counts IV and VII allege separate conspiracies. However, in order to keep the matter in its full context, we will discuss each of the subdivisions the Government attempts to make.

The United States Attorney commences his discussion of the multiple conspiracy theory with the proposition that the count I conspiracy was a new one formed in 1953 between Helm, Duke and the smugglers to smuggle birds by airplane. (Appellee's Br., p. 113.) In fact, it appears from the Government's statement of facts that this was merely a continuation of the old Hadzima-Spicuzza, *et al.*, conspiracy which had been involved in the *Steiner* case. (Appellee's Br., pp. 3-6.) There was merely an addition of two members, Duke and Helm, for the purpose of

remedying the temporary setback suffered by the conspirators as a result of the loss of their "mules." (Appellee's Br., pp. 4-5.) Helm was, in effect, nothing more than a new "mule" provided by Duke.

The United States Attorney next seeks to separate the so-called count IV conspiracy from that charged in count I. (Appellee's Br., pp. 114-115.) He notes changes in personnel, although he knows full well that adding or dropping members does not create a new conspiracy. (*United States v. Witt*, 2 Cir., 215 F. 2d 580.) Furthermore, the personnel differences are not as distinct as it might appear from counsel's list. Buono may not properly be included as a conspirator, since the jury acquitted him of participation. Of those referred to as, "conspicuously absent," Vosburg, Segovia and Hamm had been inactive since before the alleged inception of the count I conspiracy. (Appellee's Br., pp. 4-5.) Todd and Spicuzza, although not named as unindicted co-conspirators, were proved to have been such. As the United States Attorney points out a few sentences later in the same paragraph, they were the Mexican contact men for the smuggling. One of the overt acts alleged in count IV was the smuggling of a load of psittacine birds for which Spicuzza arranged. (Appellee's Br., pp. 8, 16.) The conspiratorial object alleged in count IV was identical to that alleged in counts I and VII—the smuggling of psittacine birds into the United States for sale. (Appellee's Br., pp. 12, 15-16, 18-19.) Nowhere does the indictment refer in any way to, "hi-jacking," as an object of a conspiracy or otherwise. The evidence shows that the hi-jacking was merely a form of the cheating of each other which the conspirators had practiced as an incident to their smuggling conspiracy from its original inception, that hi-jacking was

futile without successful smuggling, and that, when the hi-jacking began to interfere with the smuggling, the hi-jacking was immediately stopped. It is apparent that the alleged count IV conspiracy was continuous in time with that alleged in count I, and that its object, the smuggling of psittacine birds into the United States for sale, was the same. That purpose was carried out by the same personnel performing the same functions as they had performed in the count I conspiracy. The conspiracies alleged in counts I and IV were one and the same.

Appellee's attempt to make a separate conspiracy of count VII is equally futile. He relies upon a supposed difference in locale. Both counts allege San Diego and Imperial Counties, but they differ in that count IV includes Riverside, while count VII adds Los Angeles. This supposed distinction is so trivial as to be absurd, when one considers that throughout the period involved in this case the conspirators were operating throughout the United States and Mexico, and even in Europe. Counsel again seeks to distinguish the two counts on the basis of differences in personnel. The supposed differences are not impressive, especially when one considers that the smuggling under both counts was carried on by the same persons in the same way. Furthermore, as we have already seen, changes in personnel are not a basis for finding separate conspiracies.

Counsel also seeks to distinguish count IV from count VII on the basis of the presence or absence of, "hi-jacking." We have already seen that "hi-jacking" was only incidental to the alleged count IV conspiracy and was not referred to in the indictment. It is, therefore, not a basis for distinguishing count IV from count VII. Furthermore, "hi-jacking" does not appear to be restricted to

count IV. The Government states that it occurred during the count I period. (Appellee's Br., p. 6.) Counsel also states on page 115 that appellants entered the count VII conspiracy in order to restore the fortunes of Todd and Spicuzza, so that they might hi-jack them further in the future. If this be so, the hi-jacking element is common to counts IV and VII and no possible distinction can be made between them on the basis of it.

For the foregoing reasons we respectfully submit that the Government's attempt to subdivide the single conspiracy shown by the evidence in the case at bar is unsound. Appellant Buono's conviction on count VII and on counts VIII, IX and X based thereon was, therefore, erroneous and must be reversed.

Conclusion.

For the reasons set forth herein and in his Opening Brief, appellant Buono's convictions on counts VII, VIII, IX and X were the result of error. Since the convictions could not have occurred in the absence of the errors, the errors were necessarily prejudicial. Furthermore, while the evidence of wrongdoing in the case at bar was overwhelming, the evidence tending to connect appellant Buono with that wrongdoing was singularly tenuous and unconvincing. We respectfully submit that appellant Buono is not guilty of any offense, and that justice will be done by reversing the judgment of conviction as to him.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

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vs.

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Transcript of Record

Appeal from the United States District Court for the Southern
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	45
Designation of Record on (DC)	38
Notice of	30
Supersedeas Bond on (Glens Falls Indemnity Co.)	31
Supersedeas Bond on (E. F. Grandy, Inc.) ..	35
Supplemental Designation of Points to be Relied Upon and Designation of Record on (USCA)	96
Application to File Supersedeas Bond and Or- der Thereon, Ex Parte	34
Certificate of Clerk to Transcript of Record ...	45
Designation of Record on Appeal (DC)	38
Designation of Points on Appeal and Designa- tion of Record (USCA)	96
Judgment	28

Mandate of the Court of Appeals filed Dec. 13, 1955	14
Minutes of the Court:	
Oct. 14, 1955—Continuing Hearing on Motions	8
Oct. 31, 1955—Hearing on Motion.....	13
Jan. 16, 1956—Hearing on Motions.....	16
Apr. 6, 1956—Hearing on Motion for Relief	27
Motion for Relief Pursuant to FRCP 60, etc...	19
Motion for Stay of Execution, Ex Parte.....	25
Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law, etc.....	4
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	30
Notice of Entering Nunc Pro Tunc Order.....	4
Notice of Motion to Amend Judgment Nunc Pro Tunc, etc.....	9
Notice that Judgment Docketed and Entered..	29
Notice that Order for Stay of Execution Docketed and Entered.....	26
Order Ex Parte Nunc Pro Tunc—Amending Judgment	18
Order Ex Parte Nunc Pro Tunc—Admitting Exhibits	3

iii.

Stipulation for Dismissal of Farmers & Merchants Bank and Order Thereon.....	17
Substitution of Attorneys.....	12
Supersedeas Bond on Appeal of:	
Glens Falls Indemnity Co.....	31
E. F. Grandy, Inc.....	35
Supplemental Designation of Points on Which Appellants Intend to Rely and Designation of Record (USCA).....	96
Transcript of Proceedings:	
Oct. 31, 1955.....	49
Jan. 16, 1956.....	61
Apr. 6, 1956.....	87

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

535 Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

For Appellee:

BURNETT L. ESSEY and
IRVING H. GREEN,

121 South Beverly Drive,
Beverly Hills, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, South-
ern District of California, Central Division

No. 14305-T

AMERICAN SEATING COMPANY, a New Jer-
sey Corporation,

Plaintiff and Respondent,

vs.

GLENS FALLS INDEMNITY COMPANY, a
New York Corporation, et al.,

Defendants and Appellants,

ORDER EX PARTE NUNC PRO TUNC

Good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed
that plaintiff's Exhibits 1, 9, 10 and 11, marked for
identification, and each of them, be and the same
hereby are received in evidence nunc pro tunc as
of June 1, 1953.

Dated this 1st day of June, 1953.

/s/ ERNEST A. TOLIN,

Judge of the District Court

This order signed this 5th day of April, 1954,
nunc pro tunc June 1, 1953, for the reason that by
inadvertence the Exhibits were not received into
evidence. The Court mis-remembered the events at

trial and failed to rule as it intended to do, that the Exhibits be received.

/s/ ERNEST A. TOLIN,

Judge

[196]

[Endorsed]: Filed April 5, 1954.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that nunc pro tunc order amending judgment of 6/9/53 has been docketed and entered this day in the above entitled case.

Dated: Los Angeles, California, March 30, 1955.

/s/ By C. A. SIMMONS,

Deputy Clerk

[197]

[Title of District Court and Cause.]

MOTION TO SET ASIDE JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO SET CASE FOR TRIAL, STATEMENT OF REASONS IN SUPPORT THEREOF AND NOTICE OF MOTION

Defendants Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, respectfully move this Honorable Court for an or-

der setting aside the judgment, findings of fact and conclusions of law heretofore entered in this action, and further move this Honorable Court for an order setting said case for trial.

The grounds for this motion are set forth in the accompanying Statement of Reasons. This motion will be made and based upon the decision of the United States Court of Appeals for the Ninth Circuit, No. 14,258, filed in said court on August 30, 1955, and upon the records, papers and pleadings on file in this [198] action.

Dated this 29th day of September, 1955.

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity
Company and E. F. Grandy, Inc.

Statement of Reasons in Support of Motion

On August 30, 1955, the United States Court of Appeals for the Ninth Circuit filed its per curiam opinion in the matter of the appeal of Glens Falls Indemnity Company and E. F. Grandy, Inc., Appellants, vs. American Seating Company, Appellee, which said appeal was taken from the judgment of this Honorable Court in the above-entitled case. A copy of said opinion is attached hereto and made a part hereof and is marked "Exhibit A".

The United States Court of Appeals held that the appeal was premature because the judgment did not dispose of the entire case and Rule 54(b), Fed-

eral Rules of Civil Procedure, was not complied with.

This opinion is the law of the case and it was therein held that the claims against the respective defendants were not separately stated, but one claim was asserted against Glens Falls Indemnity Company and E. F. Grandy, Inc., and a different claim on a different theory was asserted against Farmers & Merchants Bank of Long Beach. It is apparent from the opinion of the United States Court of Appeals that the theories for recovery against the respective defendants are mutually exclusive and it is obvious that only one recovery may be had by plaintiff, so that if Farmers & Merchants Bank of Long Beach is liable to plaintiff, recovery against Glens Falls Indemnity Company and E. F. Grandy, Inc., cannot be warranted. No trial of the issue of liability of Farmers & Merchants Bank of Long Beach has been had and it is apparent from the decision of the United States Court of Appeals that trial to determine liability of said defendant must be had before the case may be disposed of since it is the contention of the other defendants that if the said Farmers & Merchants Bank of Long Beach is liable, the other defendants are not. Said defendants have a substantial [200] interest in the trial of such issue and the same cannot be tried independently of the issue of liability of Glens Falls Indemnity Company and E. F. Grandy, Inc.

In view of the fact that the liability of Farmers & Merchants Bank of Long Beach affects the lia-

bility of the other defendants, this is not the type of case contemplated by Rule 54(b) of the Federal Rules of Civil Procedure where judgment is authorized against one defendant if the liability of such defendant is not affected by the determination of the issues with respect to other defendants. [201]

* * * * *

We respectfully submit that in the instant case the entire matter may be determined in one trial, thus avoiding the costs of piece-meal review and at the same time without denying justice by delay, and that the case should therefore be set for trial as to all issues and one determination disposing of the entire case should be made.

Respectfully submitted,

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.,

Notice of Motion

To Wolfson & Essey and Irving H. Green, attorneys for plaintiff, and to M. W. Horn, attorney for Farmers & Merchants Bank of Long Beach:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above-entitled Court in the courtroom of the Honorable Ernest A. Tolin, Judge, in the United States Post Office and Court House Building, Los Angeles, California, on the 24th day of October, 1955, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated: September 29, 1955.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity
Company and E. F. Grandy, Inc.

Affidavit of Service by Mail Attached. [204]

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 14, 1955, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: Wm. A. White; Reporter: None;
Counsel for Plaintiff: No appearance; Counsel for
Defendants: No appearance.

Proceedings: Pursuant to request of attorneys
It Is Ordered that hearing on motion heretofore
set for Oct. 24, 1955, is continued to Oct. 31, 1955,
10 a.m.

JOHN A. CHILDRESS,
Clerk [205]

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND JUDG-
MENT NUNC PRO TUNC, STATEMENT
OF REASONS IN SUPPORT THEREOF

To Glens Falls Indemnity Company and E. F.
Grandy, Inc.; and John E. McCall and Albert
Lee Stephens, Jr., their attorneys; Farmers &
Merchants Bank of Long Beach and M. W.
Horn, its attorney:

Please Take Notice that, plaintiff American Seat-
ing Company, a corporation, will move the above
entitled Court for an order nunc pro tunc amend-
ing the judgment heretofore entered in this action,
in the Courtroom of the Honorable Ernest A. Tolin,
in the United States Post Office and Court House
Building, Los Angeles, California, on the 31st day
of October, 1955, at the hour of 10:00 a.m., or as
soon thereafter as counsel may be heard.

The grounds for this motion are set forth in the
accompany Statement of Reasons. This motion will
be made and based upon the decision of the United
States Court of Appeals, Ninth Circuit, No. 14258,
filed in said Court on August 30, 1955, and upon the
records, papers and pleadings filed in this action.

Dated this 18th day of October, 1955.

BURNETT L. ESSEY and
IRVING H. GREEN,

/s/ By BURNETT L. ESSEY,
Attorneys for Plaintiff

[206]

Statement of Reasons

The United States Court of Appeals, Ninth Circuit, filed a per curiam opinion on August 30, 1955, in the matter of the appeal of Glens Falls Indemnity Company and E. F. Grandy, Inc., vs. American Seating Company, which appeal was taken from the judgment of this Honorable Court. The Appellate Court held that the appeal was premature because the judgment below did not dispose of the entire case by the method provided in Rule 54(b) Federal Rules of Civil Procedure. The Court of Appeals stated in its opinion that the record is "devoid of any compliance with Rule 54(b), Federal Rules of Civil Procedure."

Rule 54(b), Federal Rules of Civil Procedure, entitled "Judgment on Multiple Claims," provides for a method by which the Court can direct a final judgment on less than all the claims in an action containing multiple claims. The Court must make "an express determination that there is no just reason for delay" and also must make "an express direction for an entry of judgment." The rule concludes by stating that, in the absence of such determination, any order adjudicating less than all the claims shall not terminate the action, and the order is subject to revision any time before adjudication of all the claims.

It is the position of the plaintiff that such compliance with Rule 54(b) should be accomplished by this Court by means of an order nunc pro tunc amending the original judgment to include the necessary language of Rule 54(b).

This is a case with several claims on several theories and thus it is a proper case for the application of Rule 54(b). In the original trial of the case a stipulation and order were entered to hold the action as against Farmers and Merchants Bank of Long Beach in abeyance and to separate the issues for trial. On Page 99 of the Transcript of Record submitted to the United States [207] Court of Appeals in the appeal of this action, this Honorable Court stated that it is possible to sever and try issues piecemeal under the federal procedure. The stipulation and order were made on Page 107 of said transcript. A judgment was subsequently entered in favor of plaintiff, American Seating Company, and against the defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc.

There is, therefore, only one further step required in order to have a complete record and a final judgment under Rule 54(b). There must be a technical compliance with the wording of said rule that there be "an express determination that there is no just reason for delay" and that there be "an express direction for entry of judgment." The plaintiffs hereby request the Court to make such compliance, since there is no just reason to delay the finality of this judgment. [208]

* * * * *

We respectfully submit that in the present case, there has been a judgment entered in favor of plaintiff on one of its mutiple claims; that this was done by order of this Court and by stipulation of all parties; that the only formality lacking is "an

express determination that there is no just reason for delay" and "an express direction for an entry of judgment" on this single claim. We therefore pray for an order nunc pro tunc amending the [209] original judgment and including the above language, as required by Rule 54(b), Federal Rules of Civil Procedure.

Respectfully submitted,

BURNETT L. ESSEY and
IRVING H. GREEN,

/s/ By BURNETT L. ESSEY,
Attorneys for Plaintiff [210]

Affidavit of Service by Mail attached. [211]

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

To Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.; and John E. McCall and Albert Lee Stephens, their attorneys; and Farmers & Merchants Bank of Long Beach and Charles Z. Walker, its attorney:

Plaintiff hereby substitutes Burnett L. Essey and Irving H. Green as its attorneys of record in the place and stead of Wolfson & Essey and Irving H. Green.

AMERICAN SEATING COMPANY,
/s/ By R. H. ZIMMERMAN

We consent to the above substitution.

WOLFSON & ESSEY and
IRVING H. GREEN,

/s/ By BURNETT L. ESSEY [212]

The above substitution is accepted.

BURNETT L. ESSEY and
IRVING H. GREEN,

/s/ By BURNETT L. ESSEY

Dated this 21st day of October, 1955. [213]

Affidavit of Service by Mail attached. [214]

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 31, 1955, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: Wm. A. White; Reporter: Virginia
Wright; Counsel for Plaintiff: Irving H. Green;
Counsel for Defendants: Albert Lee Stephens, Jr.,
for Glens Falls and E. F. Grandy, Inc., Chas. Z.
Walker for Farmers & Merchants Bank of Long
Beach Calif., Walker & Horn by D. Thomas John-
stone.

Proceedings:

For hearing on motion of defendant Glens Falls
Indemnity Co. and E. F. Grandy, Inc., to set aside
judgment, findings of fact, and conclusions of law
and to set case for trial, and

For hearing on motion of plaintiff to amend judgment heretofore entered, nunc pro tunc.

It Is Ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach, signed by the Court this day, be set aside and that said dismissal not be filed.

On motion of Attorney Stephens It Is Ordered that hearing on all matters calendared for today are continued to Jan. 16, 1956, 1:30 p.m.

JOHN A. CHILDRESS,

Clerk

[215]

[Title of District Court and Cause.]

MANDATE

The President of the United States of America:

To the Honorable, the Judges of the United States
District Court for the Southern District of
California, Central Division, Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in a cause between American Seating Company, a New Jersey Corporation, Plaintiff, and Glens Falls Indemnity Company, a New York Corporation, E. F. Grandy, Inc., a California Corporation, and Farmers & Merchants Bank of Long Beach, a California Corporation, Defendants, No. 14305-T, a Judgment was duly filed on the 9th day of June, 1953; which said

Judgment is of record and fully set out in the office of the Clerk of the said District Court in said cause, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said Glens Falls Indemnity Company, etc., et al., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 29th day of March, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is, dismissed.

(August 30, 1955.) [216]

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the third day of October

in the year of our Lord one thousand nine hundred and fifty-five.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: Filed Dec. 13, 1955.

[Endorsed]: Judgment docketed and entered
Dec. 15, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Jan. 16, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: Wm. A. White; Reporter: Virginia
Wright; Counsel for Plaintiff: Irving H. Green;
Counsel for Defendants: Albert Lee Stephens, Jr.,
for Glens Falls and E. F. Grandy, Inc.; D. Thos.
Johnstone, Jr., for Farmers & Merchants Bank,
Long Beach.

Proceedings: For hearing on (1) motion of defendant Glens Falls Indemnity Co., and E. F. Grandy, Inc., to set aside judgment, findings of fact, and conclusions of law and to set case for trial; and (2) motion of plaintiff to amend judgment heretofore entered, nunc pro tunc.

Attorney Stephens urges defendants' motion to set aside judgment and findings and set case for trial.

Attorney Green argues in opposition to defend-

ants' motion and urges the Court to enter dismissal as to defendant Farmers & Merchants Bank.

Attorney Johnstone urges entry of dismissal as to Farmers & Merchants Bank.

Court Orders that cause as to all motions stand submitted.

JOHN A. CHILDRESS,

Clerk

[217]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated, by and between the plaintiff and the defendant Farmers & Merchants Bank of Long Beach, a California corporation, that the above entitled action may be dismissed without prejudice as to the defendant Farmers & Merchants Bank of Long Beach, a California corporation. That said dismissal shall be without cost to either party.

Dated this 15th day of October, 1955.

BURNETT L. ESSEY and

IRVING H. GREEN,

/s/ By IRVING H. GREEN,

Attorneys for Plaintiff

/s/ WALKER & HORN,

/s/ By CHARLES Z. WALKER,

Attorneys for Defendant Farmers &
Merchants Bank of Long Beach

ORDER

Upon reading and filing the within Stipulation and good [218] cause appearing therefor,

It Is Hereby Ordered that the above entitled action may be dismissed as against the defendant Farmers & Merchants Bank of Long Beach without prejudice.

Dated this 31st day of October, 1955.

/s/ ERNEST A. TOLIN,
Judge

The Clerk is directed to enter the above order.
March 23, 1956.

/s/ ERNEST A. TOLIN,
Judge

[219]

[Endorsed]: Filed, docketed and entered March 23, 1956.

[Title of District Court and Cause.]

ORDER EX PARTE NUNC PRO TUNC

Good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed that, the final judgment heretofore entered in favor of the plaintiff American Seating Company, a New Jersey corporation, against Glens Falls Indemnity Company, a New York corporation, and E. F. Grandy, Inc., a California corporation, on the 9th day of June, 1953, is hereby amended nunc pro

tunc as of the 9th day of June, 1953, to include the following language:

“This Court expressly directs the entry of judgment in favor of the plaintiff and against Glens Falls Indemnity Company, a New York corporation and E. F. Grandy, Inc., a California corporation. This Court makes the express determination that there is no just reason for delay in the entry of said judgment.”

Dated this 30th day of March, 1956.

/s/ ERNEST A. TOLIN,

Judge of the District Court [220]

[Endorsed]: Filed, docketed and entered March 30, 1956.

[Title of District Court and Cause.]

MOTION FOR RELIEF PURSUANT TO F.R.
C.P. 60, STATEMENT OF REASONS IN
SUPPORT THEREOF AND NOTICE OF
MOTION

Defendants Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, respectfully move this Honorable Court for an order relieving said parties from the final judgment in the above entitled case in the respects set forth in the grounds for this motion as hereinafter stated.

The grounds for this motion are set forth in the accompanying statement of reasons. This motion will be made and based upon all of the records,

papers and pleadings on file in this action and upon the Clerk's minutes and dockets and transcripts of proceedings herein and upon the accompanying affidavit. [221]

Dated this 3rd day of April, 1956.

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and
E. F. Grandy, Inc. [222]

Statement of Reasons in Support of Motion

On September 30, 1955 the moving parties herein filed a Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion. Subsequent thereto, on or about the 18th day of October, 1955, plaintiff filed a Notice of Motion to Amend Judgment Nunc Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities and both motions came on for hearing on October 31, 1955 before the Honorable Ernest A. Tolin, United States District Judge. On said day plaintiff filed a stipulation for dismissal of Farmers & Merchants Bank of Long Beach. On that day the court ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach be set aside and that said dismissal not be filed and an oral motion to file said stipulation was made in open court by counsel for plaintiff. All matters were then continued for argument to Janu-

ary 16, 1956 at 1:30 p.m. At said time the aforesaid three motions were argued and submitted.

On April 3, 1956 counsel for defendants, the moving parties herein, received notice from the Clerk of the court, which said notice was dated March 30, 1956, that the court had entered nunc pro tunc order amending judgment of June 9, 1953 and that said order had been docketed on March 30, 1956. This order was in effect a ruling upon the second motion hereinabove referred to. The first motion above referred to was not ruled upon at all. Upon telephone call to the Clerk's office immediately upon receipt of the aforesaid notice from the Clerk, which was received April 3, 1956, counsel for defendants was [223] advised that the stipulation for the dismissal of the Farmers & Merchants Bank of Long Beach was docketed March 23, 1956. Presumably this was in effect a ruling upon the oral motion of counsel for plaintiff hereinabove referred to. No notice of the docketing of such order was received by counsel for defendants and said counsel is advised and believes and thereupon alleges that no notice of the docketing of such stipulation was given to any of the parties to this litigation either orally or in writing.

Ten days had already expired on April 2, 1956 and one day prior to any knowledge of the docketing of such dismissal. Counsel for plaintiff has argued and counsel for defendants believes that upon the dismissal of said defendant, the Farmers & Merchants Bank of Long Beach, the judgment heretofore entered on June 9, 1953, became final

and appealable since with the dismissal of said defendant no further matter was left for determination in the trial court and the judgment from that date forward is no longer a judgment upon one of multiple claims.

The Clerk's failure to give notice of the docketing of said order is a breach of the Clerk's duty as provided in F.R.C.P. 77(d) and constitutes a clerical mistake or inadvertence entirely outside the knowledge or control of the moving parties or their counsel, which mistake has caught counsel for the moving parties by surprise and has deprived him of an opportunity to move pursuant to F.R.C.P. 59 for a new trial or to alter or amend the judgment.

The order nunc pro tunc amending the judgment of June 9, 1953, is, we respectfully submit, an inadvertent error on the part of this Honorable Court in one of two respects: Either (1) that the dismissal of the Farmers & Merchants Bank of Long Beach having been filed, the judgment has at that point become [224] final and appealable and the said nunc pro tunc order is of no force and effect insofar as the appealability of said judgment is concerned; or (2) it would appear to amend the said judgment in such a way since the same is ordered nunc pro tunc as to render the judgment final as of June 9, 1953, thereby ostensibly defeating defendants' right to appeal, which, we respectfully submit, was not the intention of this court.

At the time of the argument of the aforesaid motions counsel for plaintiff conceded that the

judgment was in error to the extent of an excess of the amount to which plaintiff claimed it was entitled in the sum of \$231.63.

F.R.C.P. 60(b)(6) authorizes the District Court to give relief from the operation of any judgment for any reason justifying the same upon motion made within a reasonable time and this motion was made on the day that the reasons for relief were discovered.

Defendants, the moving parties, respectfully urge the court that they are entitled to the relief hereinabove requested correcting the judgment as to amount and eliminating the apparent effect of a nunc pro tunc order and said parties respectfully represent to the court that the surest and best way to obtain said relief and to protect defendants' right of appeal is by setting aside the judgment presently entered and the entry of a new judgment correcting the amount of the judgment and in the light of the dismissal of the Farmers & Merchants Bank of Long Beach, eliminating the nunc pro tunc order of amendment.

Defendants further very respectfully represent to the court that they are entitled to relief from the entire judgment in view of the court's statement made in open court either on October 31, 1955 or January 16, 1956, to the effect that the [225] case had not been presented to the court at the time of trial in a manner which enabled the court to understand the case of the defendants, whereby it appears that judgment against defendants was in

effect granted without full consideration of the merits of defendants' case.

* * * * *

Respectfully submitted,

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.

Duly Verified. [227]

Notice of Motion and Order Shortening Time

Whereas, the undersigned United States District Judge will not have a motion calendar until April 23, 1956; and

Whereas, it seems desirable to hear and determine the within motion prior to said date;

Now, Therefore, on motion of counsel for defendants Glens Falls Indemnity Company and E. F. Grandy, Inc. and good cause appearing therefor, the time for notice of the within motion is hereby shortened to one day to enable the same to be heard Friday morning, the 6th day of April, 1956, at the hour of 3 o'clock p.m. on said day provided that service of said motion is accomplished by delivering a copy of said motion and notice thereof to the office of Irving H. Green, one of counsel for plaintiff, on Wednesday, April 4, 1956, before the hour of 5:00 o'clock p.m.

Dated: April 4, 1956.

/s/ ERNEST A. TOLIN,

United States District Judge

To Wolfson & Essey and Irving H. Green, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above entitled court in the court room of the Honorable Ernest A. Tolin, Judge, in the United States Post Office and Courthouse Building, Los Angeles, California, on the 6th day of April, 1956 at the hour of 3:00 o'clock p.m., or as soon thereafter as counsel may be heard.

Dated: April 4, 1956.

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.

[Endorsed]: Filed April 4, 1956.

[Title of District Court and Cause.]

EX PARTE MOTION FOR STAY OF EXECUTION PURSUANT TO F.R.C.P. RULE 62 (b)

Come now Glens Falls Indemnity Company and E. F. Grandy, Inc., defendants in the above captioned action, and move the court for a stay of execution of the judgment in the within action pending the disposition of the motion made by said parties pursuant to F.R.C.P. Rule 60 filed concurrently with the presentation of this motion for stay of execution.

Dated: April 3, 1956.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and
E. F. Grandy, Inc.

Execution shall not issue on the judgment herein
until further order of this Court.

/s/ ERNEST A. TOLIN,
Judge [229]

[Endorsed]: Filed, docketed and entered April
4, 1956.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that Order for Stay of
Execution of Judgment has been docketed and en-
tered this day in the above entitled case.

Dated: Los Angeles, California, April 4, 1956.

/s/ By C. A. SIMMONS,
Deputy Clerk [230]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 6, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: Wm. A. White; Reporter: Virginia
Wright; Counsel for Plaintiff: Frederick Tankel;
Counsel for Defendants: Albert Lee Stephens, Jr.

Proceedings: For hearing on defendant's motion
for relief pursuant to Rule 60, FRCP.

Attorney for defendant urges three points, to wit:

(1) nunc pro tunc order, dated March 30, 1956,
be recalled and set aside;

(2) Judgment itself be recalled; and

(3) A new and corrected judgment be entered.

Pursuant to the stipulation of counsel entered
into the record, these motions are ordered granted.

Attorney for defendant renews motion to set
aside findings of fact and conclusions of law and
judgment and to set the matter for trial. Court
orders said motion denied.

Court requests attorneys to agree upon form of
judgment to be entered and have the same sub-
mitted as soon as possible for the Court's signature.

JOHN A. CHILDRESS,

Clerk

[231]

York Corporation, and E. F. Grandy, Inc., a California corporation, jointly, plaintiff's costs in this action.

III.

The Clerk is directed to enter judgment accordingly.

Costs taxed at \$66.87.

Dated: This 16 day of April, 1956.

/s/ ERNEST A. TOLIN,
Judge, United States District Court, Southern District of California, Central Division

Approved as to form:

John E. McCall,
/s/ By Albert Lee Stephens, Jr.,
Attorneys for Defendants [233]

[Endorsed]: Filed April 17, 1956. Docketed and Entered April 18, 1956.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that judgment has been docketed and entered this day in the above-entitled case.

Dated: Los Angeles, Calif., April 18, 1956.

By C. A. SIMMONS,
Deputy Clerk [234]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Glens Falls Indemnity Company, a New York corporation, and E. F. Grandy, Inc., a California corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on April 18, 1956, and out of an abundance of caution, said defendants above named, do hereby further appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 9, 1953, a motion for new trial by said defendants having been denied by order entered December 30, 1953, the said judgment having become final on March 23, 1956, by dismissal [235] that day ordered and entered of defendant Farmers & Merchants Bank of Long Beach (See *Glens Falls Indemnity Co. vs. American Seating Co.*, C.A. 9th, 1955, 225 F.2d 838) and subsequently set aside by order made in response to motion of defendants under Federal Rules of Civil Procedure, Rule 60, on the 6th day of April, 1956, in order that the judgment hereinabove appealed from and dated April 18, 1956, might be entered. Said appellants further appeal from that portion of the order of the District Court made the 6th day of April, 1956, denying defendants' motion to set aside Findings of Fact and Conclusions of Law and Judgment, and to set the matter for trial, the said order being in response to defendants' motion under Federal

Rules of Civil Procedure, Rule 60, above referred to.

Dated: April 19, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By JOHN E. McCALL,

Attorneys for Appellants [236]

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Glens Falls Indemnity Company, a New York corporation, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Whereas, on June 9, 1953, in an action pending in the United States District Court for the Southern District of [237] California, Central Division, between American Seating Company, as plaintiff,

and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants; and

Whereas said judgment was subsequently recalled by the court and a new and corrected judgment was rendered against said defendants in the said action on April 18, 1956; and

Whereas, said defendants have filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the aforesaid judgments and from the partial denial of a motion made by defendants on April 6, 1956, to set aside the Findings of Fact, Conclusions of Law, and to set the matter for trial;

Now Therefore, the condition of this obligation is such that if Glens Falls Indemnity Company shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days,

proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by duly authorized officer thereof and Surety has caused this bond to be executed by its duly authorized [238] attorney in fact and caused its corporate seal to be hereunto affixed this 20th day of April, 1956.

GLENS FALLS INDEMNITY
COMPANY,

/s/ By JOHN E. McCALL,
Principal

[Seal] GREAT AMERICAN INDEMNITY
COMPANY,

/s/ By WILLIAM H. McGEE,
Attorney in fact, Surety

Notary Public Certificate attached. [239]

Examined and recommended for approval as provided in United States District Court for the Southern District of California, Central Division, Local Rule No. 8.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Defendants Glens Falls Indemnity
Company and E. F. Grandy, Inc.

I hereby approve the foregoing.

Dated this 20th day of April, 1956.

/s/ LEON R. YANKWICH,

Judge

[240]

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

EX PARTE APPLICATION TO FILE SUPER-
SEDEAS BOND (F.R.C.P. 73(e).)

Appellant and defendant, E. F. Grandy, Inc., by its counsel of record, respectfully moves the court for an order authorizing it to file a Supersedeas Bond in compliance with F.R.C.P. Rule 73(d) on the ground that the Supersedeas Bond herein filed with notice of appeal was on behalf of its co-defendant herein, Glens Falls Indemnity Company, and not on behalf of E. F. Grandy, Inc.

This motion is made and based upon F.R.C.P. Rule 73(e).

Dated: April 23, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.

It is so ordered.

/s/ WM. M. BYRNE,

United States District Judge [242]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That E. F. Grandy, Inc., a California corporation, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Whereas, on June 9, 1953, in an action pending in the United States District Court for the Southern District of California, Central Division, between American Seating Company, [243] as plaintiff, and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants; and

Whereas, said judgment was subsequently recalled by the court and a new and corrected judgment was rendered against said defendants in the said action on April 18, 1956; and

Whereas, said defendants have filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the aforesaid judgments and from the partial denial of a motion made by

defendants on April 6, 1956, to set aside the Findings of Fact, Conclusions of Law, and to set the matter for trial;

Now Therefore, the condition of this obligation is such that if E. P. Grandy, Inc. shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days, proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by the duly authorized officer thereof and Surety has caused this bond to be executed by its duly authorized attorney in fact and caused its corporate seal to be [244] hereunto affixed this 23rd day of April, 1956.

E. F. GRANDY, INC.,
/s/ By E. F. GRANDY, Pres.
Principal

[Seal] GREAT AMERICAN INDEMNITY
 COMPANY,

/s/ By W. J. McKINNON,
 Attorney in fact, Surety

Notary Public Certificate attached. [245]

Examined and recommended for approval as provided in United States District Court for the Southern District of California, Central Division, Local Rule No. 8.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By JOHN E. McCALL,
Attorneys for Defendants Glens Falls Indemnity
Company and E. F. Grandy, Inc.

I hereby approve the foregoing.

Dated this 23rd day of April, 1956.

/s/ WM. M. BYRNE,
 Judge

[246]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by rules of said court, and to include therein the record consisting of the following documents, or certified copies thereof, to wit:

1. Complaint, filed July 2, 1952.
2. Summons showing return of service as to Farmers & [247] Merchants Bank of Long Beach, Calif., and Glens Falls Indemnity Co., filed July 8, 1952.
3. Stipulation and Order extending time of defendant to answer to August 7, 1952, filed July 17, 1952.
4. Answer of defendant Glens Falls Indemnity Co., filed August 6, 1952.
5. Plaintiff's Interrogatories to defendant Glens Falls Indemnity Co., filed August 8, 1952.
6. Answers of defendant Glens Falls Indemnity Co. to plaintiff's Interrogatories, filed August 23, 1952.

7. Notice to counsel placing on setting calendar October 6, 1952 at 10:00 a.m., mailed September 17, 1952.

8. First Alias Summons as to E. F. Grandy, Inc., issued September 26, 1952.

9. Order continuing setting to January 5, 1953, entered October 6, 1952.

10. First Alias Summons with return of service, filed October 10, 1952.

11. Answer of defendant E. F. Grandy, Inc., filed October 22, 1952.

12. Plaintiff's request for admissions under Rule 36, filed November 28, 1952.

13. Plaintiff's Proposed Interrogatories to defendant E. F. Grandy, Inc., filed November 28, 1952.

14. Notice of plaintiff substituting Wolfson & Essey and Irving H. Green as attorneys of record instead of Wolfson & Essey, filed December 4, 1952.

15. Answers of defendant E. F. Grandy, Inc., to plaintiff's interrogatories, filed December 9, 1952.

16. Answers of defendant E. F. Grandy, Inc., to request for admissions under Rule 36, filed December 9, 1952. [248]

17. Order setting pretrial hearing for February 5, 1953 at 9:00 a.m., entered January 5, 1953.

18. Plaintiff's memorandum brief, filed January 27, 1953.

19. Memorandum brief of defendant Farmers & Merchants Bank of Long Beach, filed February 3, 1953.

20. Order continuing pretrial hearing to April 1, 1953, entered February 3, 1953.

21. Pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed March 5, 1953.

22. Reply brief of plaintiff to pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed March 26, 1953.

23. Minute order dated April 1, 1953, of proceedings in chambers that day, providing for admission of exhibits and setting case for trial May 8, 1953, and severing trial as to defendant Farmers & Merchants Bank of Long Beach.

24. Copy of contract Noy-16752 Spec. No. 30656, Navy Dept., Bureau of Yards and Docks, E. F. Grandy, Inc., Contractor, filed May 4, 1953.

25. Memorandum and order thereon that case proceed to trial May 8, 1953, filed May 5, 1953.

26. Minute order re proceedings on May 8, 1953.

27. Pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed May 22, 1953.

28. Order that judgment be entered in favor of plaintiff, entered May 27, 1953.

29. Plaintiff's reply to defendants' brief, filed June 2, 1953.

30. Findings of Fact and Conclusions of Law, filed June 9, 1953.

31. Judgment, filed June 9, 1953. [249]

32. Plaintiff's cost bill, filed June 13, 1953.

33. Motion of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc. for new trial and points and authorities, filed June 19, 1953.

34. Notice of Motion for New Trial, filed June 19, 1953.

35. Minute order, entered June 25, 1953.

36. Minute order, entered September 30, 1953.

37. Minute order re proceedings October 19, 1953.

38. Plaintiff's points and authorities in opposition to defendants' motion for new trial, filed October 19, 1953.

39. Defendants' supplemental memorandum on motion for new trial, filed October 19, 1953.

40. Reply to points and authorities of plaintiff, filed October 23, 1953.

41. Order denying motion for new trial, entered December 30, 1953.

42. Ex parte motion of Glens Falls Indemnity Co. and E. F. Grandy, Inc. for Stay of Execution, filed January 11, 1954.

43. Ex parte motion and order for Stay of Execution to January 29, 1954, filed January 20, 1954.

44. Notice of Appeal of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed January 26, 1954.

45. Supersedeas Bond in amount of \$10,000 for defendant Glens Falls Indemnity Co., filed January 26, 1954.

46. Supersedeas Bond in amount of \$10,000 for defendant E. F. Grandy, Inc., filed January 26, 1954.

47. All exhibits in evidence on behalf of plaintiff.

48. All exhibits in evidence on behalf of defend-

ants, Glens Falls Indemnity Co. and E. F. Grandy, Inc.

49. Reporter's Transcript of Proceedings, April 1, 1953.

50. Reporter's Transcript of Proceedings, May 8, 1953. [250]

51. Designation of Record on Appeal dated and filed February 15, 1954.

52. Designation of Record on Appeal by plaintiff and respondent dated February 17, 1954, filed February 18, 1954.

53. Plaintiff and Respondent's Objection to Designation of Non-Essential Matters by Defendants and Appellants, dated February 17, 1954, filed February 18, 1954.

54. Certificate of Clerk (of Transcript of Record on Appeal) dated March 2, 1954.

55. Order Ex Parte Nunc Pro Tunc dated June 1, 1953, and filed April 5, 1954. (This document was apparently correctly dated in typewriting as 1954 and erroneously changed to 1953 when it was signed.)

56. Mandate of the Court of Appeals for the Ninth Circuit filed December 13, 1955.

57. Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated September 29, 1955 and filed September 30, 1955.

58. Notice of Motion to Amend Judgment Nunc

Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities (filed by plaintiff) dated October 18, 1955 and filed October 24, 1955.

59. Minute Order dated October 14, 1955 continuing hearing on motions, being items 57 and 58 of this designation, to October 31, 1955.

60. Substitution of Attorneys, substituting Burnett L. Essey and Irving H. Green as attorneys of record for plaintiff instead of Wolfson & Essey and Irving H. Green, dated October 21, [251] 1955, filed October 24, 1955.

61. Minute Order dated October 31, 1955.

62. Stipulation for Dismissal of Farmers & Merchants Bank of Long Beach, dated October 31, 1955, and Order thereon dated October 31, 1955 and filed and docketed March 23, 1956.

63. Minute Order dated January 16, 1956.

64. Nunc Pro Tunc Order Amending Judgment of June 9, 1953, filed and docketed March 30, 1956.

65. Notice re said Nunc Pro Tunc Order, item 64 of this designation, dated March 30, 1956.

66. Motion for Relief Pursuant to F.R.C.P. 60, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion and Order Shortening Time (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, filed April 4, 1956.

67. Ex Parte Motion for Stay of Execution Pursuant to F.R.C.P. Rule 62(b) (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, and Order thereon, filed and docketed April 4, 1956.

68. Notice dated April 4, 1956 that Order for Stay of Execution of Judgment docketed and entered April 4, 1956.

69. Minute Order dated April 6, 1956.

70. Judgment dated April 17, 1956 and entered April 18, 1956.

71. Notice dated April 18, 1956 that Judgment docketed and entered April 18, 1956.

72. Notice of Appeal by Glens Falls Indemnity Company and E. F. Grandy, Inc. dated April 19, 1956 and filed April 20, 1956.

73. Supersedeas Bond of Glens Falls Indemnity Company dated April 20, 1956 and filed April 20, 1956. [252]

74. Ex Parte Application to File Supersedeas Bond dated April 23, 1956 and Order thereon, all filed April 23, 1956.

75. Supersedeas Bond of E. F. Grandy, Inc., filed April 23, 1956.

76. This Designation of Record on Appeal.

77. Reporter's Transcript of Proceedings, October 31, 1955.

78. Reporter's Transcript of Proceedings, January 16, 1956.

79. Reporter's Transcript of Proceedings, April 6, 1956.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above entitled court transfer all the original papers in the file dealing

with the action or the proceedings in which the appeal has been taken.

Appellants intend by this designation of record to designate the complete record and all the proceedings and evidence in the action.

Dated: April 30, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By JOHN E. McCALL,

Attorneys for Defendants Glens Falls Indemnity
Company and E. F. Grandy, Inc. [253]

Affidavit of Service by Mail attached. [254]

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 254, inclusive, contain the original

Complaint;

Summons;

Stipulation Extending Time for Glens Falls Indemnity Co. to Answer;

Answer of Glens Falls Indemnity Co.;

Plaintiff's Interrogatories;

Answer of Glens Falls Indemnity Co. to Interrogatories;

First Alias Summons;

Answer of E. F. Grandy, Inc.;
 Request of Plaintiff for Admissions;
 Plaintiff's Interrogatories to E. F. Grandy, Inc.;
 Substitution of Attorneys;
 Answer of E. F. Grandy, Inc., to Interrogatories;
 Answer of E. F. Grandy, Inc., to Plaintiff's Request for Admissions;
 Plaintiff's Memorandum Brief;
 Memorandum Brief of Farmers & Merchants Bank of Long Beach;
 Pre-Trial Brief of Glens Falls Indemnity Co. and E. F. Grandy, Inc.;
 Reply Brief of Plaintiff to pre-trial brief of Defendants;
 Memorandum re Time of Trial;
 Pre-Trial Brief of Glens Falls Indemnity Co. and E. F. Grandy, Inc.;
 Plaintiff's Reply to Defendants' Brief;
 Findings of Fact and Conclusions of Law;
 Judgment;
 Cost Bill of Plaintiff;
 Motion for a New Trial by Glens Falls Indemnity Co. and E. F. Grandy, Inc.;
 Notice of Motion for New Trial;
 Defendants' Supplemental Memorandum on Motion for New Trial;
 Points and Authorities of Plaintiff in Opposition to Defendants' Motion for a New Trial;
 Reply to Points and Authorities of Plaintiff in Opposition to Defendants' Motion for a New Trial;
 Ex Parte Motion for Ten-Day Stay of Execution filed by Defendants.

Ex Parte Motion and Order Thereon for Stay of Execution by Defendants;

Notice of Appeal;

Supersedeas Bond;

Supersedeas Bond;

Designation of Record on Appeal;

Designation of Record on Appeal by Plaintiff and Respondent;

Plaintiff and Respondent's Objection to Designation of Non-Essential Matter by Defendants and Appellants;

Certificate of Clerk;

Order Ex Parte Nunc Pro Tunc;

Motion to Set Aside Judgment;

Notice of Motion to Amend Judgment;

Substitution of Attorneys;

Mandate of the Court of Appeals for the Ninth Circuit;

Stipulation and Order Thereon for Dismissal;

Order Ex Parte Nunc Pro Tunc;

Motion for Relief;

Ex Parte Motion for Stay of Execution;

Judgment;

Notice of Appeal;

Supersedeas Bond;

Ex Parte Application to File Supersedeas Bond;

Supersedeas Bond;

Designation of Record on Appeal; which, together with a full, true and correct copy of the Minutes of the Court had on October 6, 1952, January 5, 1953, February 3, 1953, April 1, 1953, May 8, 1953, May 27, 1953, June 25, 1953, September

30, 1953, October 19, 1953, December 31, 1953, October 14, 1955, October 31, 1955, January 16, 1956, April 6, 1956; a full, true and correct copy of Notification of Entry of Judgment for April 18, 1956, for Setting for Trial on September 17, 1952, for Nunc Pro Tunc Order Amending Judgment on March 30, 1955, Order for Stay of Execution April 4, 1956, Notification of Entry of Judgment April 18, 1956; four volumes of Reporter's Transcript of Proceedings, Plaintiff's exhibits 1 to 17, inclusive and defendants' exhibits A, B and C; all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fee for preparing the foregoing record amount to \$2.80, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 24th day of May, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14,305-T

AMERICAN SEATING COMPANY,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, E. F. GRANDY, INC., FARMERS & MERCHANTS BANK OF LONG BEACH,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 31, 1955

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Irving H. Green, 121 So. Beverly Dr., Beverly Hills, Calif. For the Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.: Albert Lee Stephens, Jr., 458 So. Spring St., Suite 535, Los Angeles, Calif. For the Defendant Farmers & Merchants Bank of Long Beach: Walker & Horn by D. Thomas Johnstone, 320 Pine Ave., Suite 511, Long Beach, Calif. [1*]

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Co., et al.

Hearing on motion of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., to set aside

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

judgment, findings of fact and conclusions of law and to set case for trial;

Hearing on motion of plaintiff to amend judgment heretofore entered, *nunc pro tunc*.

Mr. Stephens: I am ready, if your Honor please. I have just been advised by Mr. Green that he has dismissed,—I don't know if your Honor has entered an order of dismissal as against the Farmers & Merchants Bank of Long Beach. I am caught unprepared on this, in effect.

The Court: It catches me unprepared. He came in just before I came to the bench, and that bank hasn't filed a responsive pleading, at least so far as my file shows, so I think he has a right, as a matter of law, to dismiss. What effect that has I just can't tell at this moment.

I suppose, while Mr. Green has reserved it, you haven't. So how much time do you want?

Mr. Stephens: I don't know what I should say about that. I do feel this way about it, though: It could have been dismissed in the Court of Appeals, you know, as easily as here. There has been a month go by in which some thought [2] could have been given to that problem. It works rather a hardship upon my clients, because of the costs on appeal. If we go through again on appeal we are going to have to pay a new fee and so forth.

I would like to suggest this to the court: That probably in the life of every trial judge he wishes he had a moment he could take back that case on appeal and fix up some of the things that had happened, and I think this case presents an oppor-

tunity to do that, and that is really the reason I believe the judgment and the findings of fact should be set aside and the matter, notwithstanding the fact this has been dismissed, since the order certainly would not have become final until now, at least,—in other words, it is back in your jurisdiction and you have the power and authority to enter new findings of fact or set the case for trial and so forth.

I would like the matter put over, if your Honor please, but I think that if it could be at a time when you would have an opportunity to read the briefs on appeal, that it would refresh your Honor's recollection with regard to the entire case, and point out a number of things that have really worked a substantial injustice.

For example, purely just a typographical error has been made, of a difference, to the disadvantage to my client of \$231.63, which seems to me, since it almost covers the costs [3] of the briefs, it ought to be corrected. Now, this is an opportunity to do it. And that those things should be done. And I would like to give consideration to the situation as we now find it, and then be able to argue the case before the court at a time when perhaps it would be fresher in your Honor's mind.

The Court: Well, when would you like to do it?

Mr. Stephens: Any time. Two weeks would be fine, or a shorter period.

The Court: We are engaged or about to be engaged in a long trial, and being subjected to the hearing of certain seamen's cases, which we must

hear when the vessels touch the Port of Los Angeles. If I had my diary I could tell——

Mr. Green: May I be heard a moment before the court seeks its diary?

The Court: The court has found its diary, but you may be heard.

Mr. Green: I recognize it is the policy of the court to give counsel as much time as necessary in any situation. Normally, I don't oppose the granting of additional time. Goodness, I have asked for additional time many times myself.

Here is the situation that now exists in this case: The court made a judgment in favor of the American Seating Company a long time ago. It was set by the Court of Appeals, or, at least, the Court of Appeals made an opinion and said [4] the appeal was premature, the appeal of Glens Falls and the Grandy Company was premature, because the court had failed to put into its findings the magic phrase to the effect that there was no occasion for delay. I forget the exact wording.

The Court: I hadn't disposed of the fact that, as I gather it quickly now, has been disposed of by your dismissal.

Mr. Green: Yes. The point I am making now, your Honor, is that the case against the Farmers & Merchants Bank has been dismissed. This court, I respectfully submit, has no jurisdiction to in any way change its judgment or order at this time—more than six months have elapsed since the original judgment was made — except to amend the

judgment nunc pro tunc, in order to put in the qualifying phrase, if that was necessary.

But that is not necessary any more. The judgment is here and the burden is on the bonding company and the contractor to determine what course of action it may take, so far as that judgment is concerned.

I respectfully submit, even if this court had the inclination to reopen the judgment or modify the judgment, in any material sense, or grant a new trial, that the court does not have jurisdiction to do it, and, of course, that is the reason I said that you should hear me before reaching for the diary, because I don't see there is anything to continue at this time. [5]

They have made a motion for the court to vacate the judgment and grant a new hearing. I ask your Honor that that motion be denied, because the court does not have jurisdiction, and I challenge counsel to show the court it has jurisdiction by any authority to do that. If the court hasn't that authority, then what is the purpose of our coming back again, your Honor?

The Court: You can challenge him, but he has an opportunity, I think, to analyze the situation which has been created, and check into the jurisdiction.

While I rather surmise that what is going to come out of it is, in effect, an urgent suggestion to me to change my mind on the principal case. I think he does have the right to canvass the record,

in the light of the changes which have come into it, and make whatever motions are proper.

Mr. Green: Then, your Honor, if the court is going to grant time for that purpose, the only time that would be convenient to me would be some time in January, because of the fact of the pressure of my calendar for the rest of this month and the first half of December, and I expect to be out of the city the last half of December and the first week of January.

The Court: Do you object to that, Mr. Stephens?

Mr. Stephens: The interest is running, if your Honor please. The judgment stays the way it is, I realize we have [6] taken a lot of time, but I want a careful hearing and I would much rather do that than object to it.

I do want to say this: This is an astonishing position to me, because what counsel is saying is that the judgment is now final and no appeal has been taken from it. The court, in spite of the fact the appellate court sent it back, saying that the judgment has never been final, that is, not final by his action, instead of the court's and as a result we may already have passed the time for appeal. I mean, that is the necessary further inference, which I am sure is not the law.

But I am fearful, since this is something that was entirely up to counsel, so far as the dismissal was concerned, I think that a judgment rendered on a case should recite or recognize or be made in the light of any such dismissal, so that the parties would be known. In other words, the court has so

far only made a partial judgment, if your Honor please. Something further would have to be done in order to make that final.

I would ask the court, if necessary, in order to protect my position, to forthwith set aside the judgment and findings, and you could always reinstate them. But I don't want to lose the power of appeal. I mean, even if it came today and went over to January, I might be in a bad position.

Mr. Green: May I point out, your Honor, if counsel is [7] in a bad position it is a bad position of his own making.

The Court: The court granted the dismissal of the bank, but it was on your motion.

Mr. Green: I am not talking about the bank. I am talking about the fact that counsel, when he filed his appeal, did not conform with the provisions of Rule 54(b).

Mr. Stephens: Now, I didn't draw those.

Mr. Green: Just a minute. It was his function, your Honor, if he wanted to have an appeal, he should have gotten the order of the court and all the cases that go on—all the cases where the counsel have come in and gotten an order *nunc pro tunc*, because they failed to do it, have been the appellants who have done that, because they are the ones who are interested in perfecting the appeal and conforming to the rules.

For him to say, "I missed out and didn't conform to the rule, to see this was a final judgment I appealed from, and, therefore, I now want relief, it wasn't us that made the mistake,——"

The Court: That was as much your duty as his; as much mine as both of you.

Mr. Green: Not under the decisions.

The Court: The appellate court thought so, because they sent it back and said, "Fix up the record, Judge. We will hear the case." [8]

Mr. Green: That isn't exactly what the Court of Appeals did.

Mr. Stephens: Wants to preserve the appeal——

Mr. Green: We didn't want to preserve the appeal. It was your function to preserve the appeal, if you wanted to appeal.

Mr. Stephens: If I may say, counsel drew the findings of fact and conclusions of law and so forth. The judgment is not final. He did not have a judgment he could execute on. It is just as much to his interest to have a final judgment, which would bear an execution, as it is that would bear an appeal; so it cuts both ways.

The Court: Well, let's see, are you in agreement?

Mr. Stephens: I am fearful of the time of appeal passing, your Honor. I mean if——

Mr. Green: If the time of appeal has passed—it hasn't. If it hasn't, whether it is next week or next month isn't going to make any difference, so far as I can see.

Mr. Stephens: I don't agree with counsel.

Mr. Green: I won't oppose the time.

The Court: Neither of you raised the point of the imperfection of the record, but the Circuit

Court did, and has given no intimation as to how they would rule on the merits of the case.

I think the most provident thing would be for me to set [9] aside the dismissal as to the bank to-day. I set that aside; withdraw it.

And then we will hear the motion and you can re-present that and I will act the same way again, when you are ready to argue the merits.

Then Mr. Stephens' right of appeal will be preserved, if I still stand by the position which I reached after a quite considerable trial we had here, Mr. Stephens, before you came into the case.

Mr. Stephens: I am familiar with the record, if your Honor please. I know what happened.

Mr. Johnstone: Your Honor, may I be heard?

The Court: Yes.

Mr. Johnstone: I am appearing for Walker & Horn. D. Thomas Johnstone.

Mr. Green: I didn't know you were appearing.

Mr. Johnstone: I wasn't quite sure of my status, your Honor, because the bank had been dismissed, but if your Honor is withdrawing the dismissal I would like to ask whether or not at this next hearing the propriety of the dismissal or the entry of the dismissal will be argued or discussed.

The Court: I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind.

Mr. Johnstone: We would stipulate to the entry of the dismissal.

Mr. Green: They have so stipulated.

The Court: My only purpose in withdrawing the dismissal is to preserve the status quo, so Mr. Stephens will not be prejudiced on appeal by any action taken here today.

Mr. Johnstone: I understand that was the only——

Mr. Green: Then if your Honor is going to withdraw the dismissal at this time temporarily, then I ask that we go ahead with our motion this morning; our mutual motion. There is no reason for a continuance.

The Court: All right.

Mr. Green: Then Mr. Stephens isn't faced with any new situation and he can argue his motion. I want to argue mine for the order nunc pro tunc.

The Court: Are you ready to proceed, Mr. Stephens?

Mr. Stephens: Yes.

Mr. Johnstone: If I may say one thing. I came today prepared to see a dismissal entered, and I am not prepared to oppose the motion of Mr. Green.

The Court: Well, I understand you are moving ot dismiss again, are you, Mr. Green?

Mr. Green: We have a stipulation to dismiss as to the Farmers & Merchants Bank, and we so move.

Mr. Stephens: I suggest—— [11]

The Court: You are ready to argue, Mr. Stephens?

Mr. Stephens: I am ready to argue, not on the dismissal, if your Honor please. That was not what

I understood Mr. Green to want to do. But upon the motion to set aside the findings of fact and conclusions of law and the judgment, and resubmit the case for trial.

Now, Mr. Green has at the same time a motion on to add by order nunc pro tunc a finding of your Honor under 54(b), which would make the matter perfecting the appeal in effect. I think we are wasting our time today to argue if Mr. Green really intends to press the dismissal. I suggest if he makes that motion your Honor take it under advisement until such time as we can look into the other matter and argue it all at one fell swoop.

Mr. Green: This morning counsel has a motion before the court to vacate the judgment and have a hearing. If he wants to argue that, we are ready to argue with him on it.

The next motion on the nunc pro tunc may not be necessary, in view of the fact we have a stipulation to dismiss the case.

Now, I can't understand why Mr. Stephens would want more time if he is ready to argue. If he wants time and the court wants to grant it, I don't care one way or the other.

The Court: We are either going to have to retry the case, at least so far as the bank is concerned, or grant your [12] dismissal.

Mr. Stephens: That is my view.

Mr. Johnstone: Yes.

The Court: We are going to try this bank or dismiss the case as to them. You are not willing to dismiss or have it dismissed as to them and not

have some time in which to argue matters to this court, which arise by reason of that dismissal?

Mr. Stephens: That is correct.

The Court: I don't think in this type of case anything would arise, but it might. I don't know until I look into it. Or there might——

Mr. Stephens: Frankly, I don't know, either, your Honor.

The Court: I am not going to have——

Mr. Stephens: I would have been prepared if he had told me in advance he was about to file a dismissal and had let me in on it. That is the only thing that I don't think is quite fair, in the way this has been presented.

The same thing has happened before, if your Honor please. I made a motion on ample notice in the Ninth Circuit to correct the record because certain exhibits had been added into the record, which had not been admitted in evidence. On the morning of the hearing, and without letting me know at all, Mr. Green came down and obtained an order *ex parte* from your Honor, although I was right here [13] on the 16th floor and could have been heard.

It made no difference to me, if your Honor please, when he presented the order which made your Honor's intentions clear; I didn't further oppose it. But it seems to me these things should not come up at the last minute and preclude an opportunity to know what the meaning is.

So I think that we should continue this matter to a time that suits Mr. Green's convenience, on the

suggestion your Honor has made, and settle them all at one hearing.

The Court: Is January 16th at 1:30 an agreeable time?

Mr. Stephens: It would be agreeable to me.

The Court: Is it agreeable to you, Mr. Green?

Mr. Green: It is my impression it is, your Honor. I don't have my diary here.

The Court: The case is continued to January 16, 1956, at 1:30 in the afternoon, for consideration of all matters on the calendar today and all uncalendared matters presented to me in chambers, that is, the consideration of whether I shall direct the clerk to enter the order of dismissal as to the bank, pursuant to the stipulation which the bank and Mr. Green have executed.

Mr. Stephens: May the minutes show, if your Honor please, today's hearing, that your Honor has set aside the dismissal so that the record will be complete in that respect?

The Court: The clerk is directed to have the minutes [14] so show. If you wish a formal order on it and you think you get any more protection from the formal order, you may submit one.

(Whereupon, at 10:30 o'clock a.m., Monday,

October 31, 1955, an adjournment was taken.)

[Endorsed]: Filed May 22, 1956.

Monday, January 16, 1956. 1:30 p.m.

The Court: I was not aware we had anything until *American Seating Company vs. Glens Falls Indemnity*.

Mr. Green: I am here representing American Seating Company.

The Court: I have had a call from Mr. Stephens, who represents your opponent. He said he was unavoidably detained. He was leaving immediately by cab and would be here in a few minutes.

Do you have anything else before that?

The Clerk: No, sir. Valderhaug at 2:00 o'clock.

The Court: Then we will adjourn until Mr. Stephens gets here.

(Short recess taken.)

The Court: All litigants now are represented?

The Clerk: Yes, they are all here.

The Court: Call the case.

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Co., et al.

Mr. Stephens: Ready for the moving party, your Honor please.

Mr. Green: We are ready here for American Seating Company.

Mr. Johnstone: Ready for the Farmers & Merchants Bank. [18]

The Court: There are two moving parties. Mr. Stephens moves to set aside the judgment, findings of fact, and conclusions of law, and set the case for trial.

The plaintiff moves to amend the judgment nunc pro tunc.

Mr. Stephens is on his feet, so I will hear him first.

Mr. Stephens: I wish to apologize to the court for being late. I am sorry about that.

My motion, if your Honor please, or, the situation is this: I noted that on the same day that decision came down in this case, relying upon Rule 54(b) as the reason for the decision, another decision was made involving the same rule and was filed in the Ninth Circuit Court of Appeals on the same day.

In that case, instead of sending it back to add to the judgment or for further action, or, rather, instead of sending it back as it was done in this case, they referred it back to the judge for the purpose of simply filling in what apparently appeared to that court as something that was overlooked.

Knowing of that fact, I felt in my own mind, since this case was not considered upon the merits at all in the appellate court, although argued upon the merits and briefed upon the merits, that possibly the court felt that your Honor might wish to further consider the question of making a finding, that time would be saved and the interest of justice, that the [19] two different matters which were mentioned in the complaint should be severed.

Now, I recognize that it is largely a matter of discretion, where there are two separate occurrences, giving rise to two separate claims, as to whether those particular issues would be tried in one action or are so severable that time would be saved and the convenience of the parties would be promoted by severing and trying one of the issues.

I, in my own mind, believe this case on the factual side is not the type of case where justice is

best served by severing the two separate issues. I say that for many reasons, but I think possibly the most obvious reason is that the case was tried on an agreed statement of facts which, unfortunately, is rather confusing from the record.

There was no witness sworn. It took only a day and yet the subsequent proceedings, as your Honor knows, have been very protracted, and all, because, at least, to my way of looking at this case the foundations which would make decision easy for your Honor were not laid.

Therefore, we think that this is not the proper case for an application of Rule 54(b).

The cases which were cited in my memorandum and which were cited in opposing counsel's memorandum point out that the application of Rule 54(b) is to the situation where there are two occurrences.

The appellate court held—and I think this undoubtedly is the law of the case—that there were two separate claims stated against the respective defendants; but in one count. I don't know that that was so obvious at the time of trial, because, as I read the record, the understanding more or less was that the Farmers & Merchants National Bank, as it one time expressed, was a stand-by defendant.

Counsel has argued in his reply memorandum that an order was made for separate trial of the Glens Falls matter by stipulation. I have searched the record and I don't find that the record confirms that statement.

I think it was done by order of the court. I don't

find in the record any expressed objection at that time to handling the case in that way.

The Court: Well, counsel, it doesn't apply just to the counsel who were representing the litigants at the time of trial, but counsel generally have a bad habit of talking to judges in the halls or in chambers, and the first thing you know there is kind of a tacit agreement or understanding that springs up or someone thinks it has.

I can't recall just where the conversations were had, but I do recall conversations to the effect that the trial be conducted along the lines that it was, although I don't think that is memorialized in any way in the record, as I have looked that record over since the matter went up on appeal. [21]

I have commenced in recent months to have a policy of having everything on the record, although if someone comes in to say good morning I am not going to the extent of having that on the record.

So many times counsel come in and begin on the basis of a friendly personal call, and they wind up with the presentation of some matter which will tend to shape judicial action; and that should never be done except on the record.

I am afraid it was done here, although the exact details of it are so faint in my memory I couldn't put my finger on them.

Mr. Stephens: I think your Honor is undoubtedly correct in your observations. That is the type of thing that happens sometimes and it is difficult to track it down to a later time. And, as your Honor

knows, I was not present at that time or in the case at that time, so I am handicapped.

Assuming it was done by tacit understanding, nevertheless, that more or less presupposed, as I gathered from the record, that by the time, if a judgment was granted against Glens Falls, the other party would be out.

This is a point I am trying to develop. The thought being that the one action that took place affected both defendants, and one may be liable primarily while maybe the other would be liable secondarily. I can't tell from the [22] complaint.

But I submit now that we are up against the situation where it may be that the bank has some liability—at least, the plaintiff says it does—and that that liability might be several or it might be joint or it might be joint several, dependent on how the court might look at those circumstances.

I would think that Glens Falls would have an interest in that part of the case, and that therefore from that one standpoint it would be more convenient to try the entire case at one time so that all parties may know how they stand.

The Court: That is apparently what the appellate court thought.

Mr. Stephens: That is what I thought.

The Court: I gather that from the way in which the case was decided there, it was decided upon a defective procedure rather than an adjudication of the substance of the controversy.

Mr. Stephens: That is true. For that reason,

your Honor please, my thought is that the best way—and there are other reasons I would like to mention before I am through—that the way to protect the record and to make it a record which cannot be subject to technical objections would be to set aside the findings of fact and conclusions of law and the judgment at this time, although it seems to me that, under the rule of this case—there is no final judgment, [23] you see, at this time, so if what has already been done would be set aside, even though after the case is again submitted your Honor may enter the same judgment and the same findings and the same conclusions, with only the additional finding, if necessary, under 54(b), that we would then have a clear record.

Of course, we have written and paid for briefs on appeal, which, if the same circumstances and legal issues are to be presented, can be presented on the same briefs if counsel is willing to stipulate, or perhaps by order of the appellate court it might be done.

I think that counsel's motion for a *nunc pro tunc* order is not proper, because that is designed, in effect, to defeat the right of appeal, saying, "Now, for a time when the appeal—right time to appeal is long since run, now you go back to add something which makes a judgment which was not final at that time," and would be to defeat the right of appeal, which, of course, I think could not be done. I think that the order would speak from the time the order is actually made. But it adds another point for appeal, if we have to appeal.

The Court: The mandate has been spread in this matter, hasn't it?

Mr. Stephens: I assume so.

The Clerk: I am pretty sure it has been. [24]

The Court: Let's check.

The Clerk: Yes, it is in here. It was filed as of December 13th.

The Court: The clerk says it was filed as of December 13th. Do you want to oppose Mr. Stephens' position, counsel?

Mr. Stephens: If your Honor please, I have two or three more points I would like to be heard on, to conclude the matter.

The Court: Are they asking for other disposition of the case, because upon the presentation you have made and upon my own examination of the file I am inclined to set aside the findings——

Mr. Stephens: No. They are all directed to the same point, your Honor.

The Court: ——heretofore made, and set the case for trial. But if you have something, you are asking for something more, we will hear it.

Mr. Stephens: No.

Mr. Green: Your Honor, this case was tried before your Honor on a stipulation between the parties. It was had in chambers, severing these two cases and putting the Farmers & Merchants Bank case as a stand-by case.

As a matter of fact, it was done on the suggestion of your Honor, that because the case as to the Farmers & Merchants Bank is entirely separate and distinct from this [25] case, and it has no re-

lationship whatsoever. In other words, it isn't a question of one or the other being responsible. The only point is that we would have no case against the Farmers & Merchants Bank at all if we recover against the bonding company and against the contractor, as we did in this case.

Now, we tried this case—we had the pretrial before your Honor in chambers. We tried the case before your Honor on the trial date. Then Mr. Stephens came into the case and made motions to set aside the findings and for a new trial.

The Court then again, on considering the evidence in the case, felt we were entitled to judgment and denied the motion for new findings or for a new trial or to set aside the judgment.

The Court: And the Circuit Court said I was wrong.

Mr. Green: Your Honor please, I can't understand that the Circuit Court said anything of the kind. The Circuit Court said—I have the opinion before me—that this was a judgment upon multiple claims and the record is devoid of any indication of compliance with Rule 54(b).

All that was necessary under 54(b) was for the court to state the fact that the court felt at that time that there was no need for any delay in the case, there was no need to proceed against the Farmers & Merchants Bank, that this judgment could be final. [26]

The court didn't put that in. Probably we should have called it to the court's attention. But the real onus of this thing, your Honor, is upon the defend-

ant in this case. The defendant wanted to appeal. He did file an appeal and it is his burden to see that the record is in shape so he can appeal.

That is not the burden of the court nor is it the burden of opposing counsel. That was his burden. He was the expert in federal procedure, who was brought into this case to argue the motion for a new trial and handle this appeal, and he failed to see that the record had the provision in there, the magic statement there was no need for delay.

There is nothing in this opinion that indicates any feeling, because, your Honor, there was nothing in this record about what took place as to the Farmers & Merchants Bank. In the record that was printed the discussion in regard to the status and position of the Farmers & Merchants Bank was omitted at the request of counsel. That was not even part of the record before the Court of Appeals.

The only thing they did—there is a jurisdictional requirement that before they can hear an appeal, when there is more than one claim in a case, is for the court to make the statement that there is no reason for delay. Otherwise, they have no jurisdiction. And all they held here was that [27] the appeal was premature, because they had no jurisdiction.

Now, your Honor, we have entered into a stipulation with the Farmers & Merchants Bank that was presented to your Honor and your Honor signed an order dismissing the case as to the Farmers & Merchants Bank.

And then at the last hearing we had here the

court said that day we should resubmit the motion to dismiss as to the Farmers & Merchants Bank, and I believe the indication of what your Honor said last time was that you would grant that motion.

The only reason for delay here was so that the appeal as against—any rights of appeal should not be affected by the fact you signed the order on the date we had the last hearing rather than today.

Now, I am very much surprised and taken aback by what the court's attitude seems to be this afternoon. Here the situation is where there is no action as against the Farmers & Merchants Bank now, since we have stipulated to dismiss it.

Does this court want us to litigate something that the parties don't want to litigate? And the only excuse that Mr. Stephens has for asking for setting aside the findings is the basis that since we have to try the case against the Farmers & Merchants Bank anyhow, then we should try their case this time, in effect, for a third time, because, of course, the fact is he doesn't set up any newly discovered facts [28] or any statement even that the evidence would be any different than it was in the other trial.

Here is a case your Honor tried once. A motion for a new trial was made by Mr. Stephens—went into it very thoroughly—and in their appeal they had to the court they didn't state anything except the same arguments that they used before this court as to a new trial, and that is to the effect that this poor bonding company that got their premiums for this and wrote two bonds, because they wrote two bonds they shouldn't be liable under

either one, which is the whole gist of their appeal.

It doesn't seem to me, either from the attitude the court took on the appeal, and, certainly, not from the opinion which merely says that, "Since the judgment is one of multiple claims, the record is devoid of any indication of compliance with Rule 54(b), Federal Rules of Civil Procedure. Under such circumstances, the appeal herein is premature."

And apparently since their counsel did not make any effort to get it amended, as he could have by a *nunc pro tunc* order——

The Court: Well then, why didn't you do it? The burden is on a person who wins a lawsuit to see that the findings presented to the trial court are in proper order.

Mr. Green: Your Honor, maybe I was remiss in not doing [29] it, but it seems to me that if anyone is remiss, the person who has an appeal, who makes an appeal, must see that his record is perfected for appeal.

Is the court going to blame me for my failure to do something to aid the other side in appealing his case? I don't think I would be doing right by my client if I took that attitude.

It would be nice for all lawyers to be as helpful to each other and to the court as possible, but you shouldn't criticize me for overlooking doing something that even now the court can correct.

We have asked two things here today. We asked it the last time of this hearing. One was that we

dismissed the case as to the Farmers & Merchants Bank.

The Court: That motion was granted, wasn't it?

Mr. Green: Yes, your Honor. And a signed order was made granting it. There is no action——

Mr. Stephens: Your Honor please, that was set aside, however.

Mr. Green: Wait a minute. Well, the court at the last hearing—counsel asked that you set it aside until today, so that he would have an opportunity to reconsider what he wanted to argue to this court. And he hasn't argued anything but the same things he argued last time and every time in this case.

The court said that at this time the court would re-instate the order of dismissal and that is what we are asking for. There is no sense in trying the lawsuit.

And talking about the responsibility of the party winning the lawsuit, we are perfectly willing to submit this record to the appellate court on the basis they will sustain it on the record as it is now. If they reverse it, then we will lose our judgment, and we have dismissed the case as to the Farmers & Merchants Bank.

We are satisfied this court was right, that the findings are right, and there is nothing to change and nothing to retry, unless the court is going to change its mind from time to time on the same facts and the same issues that exactly were submitted to this court on at least two occasions.

Even in the last argument that was had here on this motion that counsel made, the fact is that the

only question that came up was whether this court should give him some extra time to present something new, in view of the fact the court had dismissed the case as to the Farmers & Merchants Bank.

Counsel talks about the delays that have occurred since this court rendered its decision. The only delays have been caused by the appellant, not by anybody else.

The case for presentation and trial took a day, and then they made the delays by making the motion for a new trial, which was denied after full argument and full briefing on the [31] question.

Then they went up on appeal, and they didn't perfect their record on appeal and then, because the court says their appeal is premature—we are willing to have the record corrected by having the court put in the *nunc pro tunc* provision, as all the cases that were cited by Mr. Stephens himself say; that is the cure.

There isn't a single case where the court has held that 54(b) applies, that a new trial was granted because of 54(b).

Now, I want to refresh the court's memory as to the facts of this case, as to why there is no relationship between the action against Grandy and the bonding company and the action against the Farmers & Merchants Bank.

The court itself says, in the opinion he says, "A different claim on a different theory was asserted against the Farmers & Merchants Bank of Long Beach."

Now, we agreed that any reference to the Farmers & Merchants Bank and the action against them didn't even have to appear in the record, because everybody thought that didn't have anything to do with the issues in this case. That is an entirely different theory of constructive trusteeship; has nothing to do with the fundamental issues. If we tried the cases together it would be an impossible situation, your Honor. We couldn't get a judgment against both. And if we got a judgment against these same defendants, we [32] couldn't even proceed against the Farmers & Merchants Bank; we would have to try them piecemeal just the same.

This court very wisely saw that at the time of pretrial, and my recollection is that the court suggested that this could be severed, and we all agreed. Mr. McCall, who represented the clients now represented by Mr. Stephens, agreed. And Mr.—I forget the name of the man that appeared for the Farmers & Merchants Bank at that time, but he agreed.

And we agreed at the time when there was a final disposition of this case, we would dismiss as to the Farmers & Merchants Bank. I don't see, your Honor, where there is any place or any reason or the slightest suggestion of a reason why the case should have to be retried against Grandy, and this time if it is retried, if it would be retried I assume they would object to retrying it, on the cold record, on the stipulated facts we had. We would now have to call in witnesses and take a week to try a lawsuit that has been decided.

I want to raise one other question. I think I would much rather argue the proposition on the merits than technicality. There is a question in my mind whether this court has jurisdiction. It is always something that is ticklish to argue before any court, but I feel that this court feels once counsel presents any facts they have or any legal reason—here was a decision, your Honor, made over a year or so ago. There is no basis for this court to entertain a motion [33] at this stage of reopening that judgment, I don't believe.

I think I called that to the court's attention at the last time as well, that this court has no jurisdiction to vacate its judgments and orders that were made over that period of time.

The Court: Well, what does the mandate tell us to do? Let's look at the mandate.

All they did was dismiss the appeal.

Mr. Green: That is all the order, the decision of the court called for; didn't say anything about the merits of the case whatsoever.

Now, if they still have grounds for appeal, they can appeal the case again,——

The Court: Well, what——

Mr. Green: ——now that the case against Farmers & Merchants is dismissed.

The Court: What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, so far as getting things over to me was concerned, just didn't get them over. The defense points, both as to the facts and as to the law, were such that I

felt the man was just talking in circles and I left the bench confused as to why he was defending the case, and since you had stated a good case for your client, I granted judgment. [34]

Now, since then the attorney who presented a confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides instead of only by your side.

Mr. Green: Your Honor will remember Mr. Stephens, this articulate, competent lawyer, who is so experienced in federal trial practice, made the motion for a new trial before your Honor and retried the case for all intents——

The Court: You didn't retry a case on a motion——

Mr. Green: Your Honor, this was a case tried entirely on stipulated facts, and it was just as easy for him, if he could make your Honor see the light, so to speak, he could have done it on his motion at that time. There must be an end to litigation, and the mere fact that a company like Glens Falls Indemnity Company and E. F. Grandy, a contractor, people of that wealth and position, that they not only had one attorney but two, as the court will recall, and both of the attorneys discussed the case, and if that is ground for new trial, your Honor, then of course I have nothing to say, because there have been so many cases——

The Court: I am telling you why I would like to grant it, is all.

Mr. Green: There have been so many cases

where I, as counsel, have been unable to convince the court. If we could [35] get that set up as a precedent for granting a new trial, I am sure there are many cases I could get a new trial in, or, my clients could get a new trial, because I didn't adequately represent them.

The Court: I will have to work it out in the light of the mandate which came down, which simply dismissed the appeal, apparently because it was premature.

Mr. Green: What about the dismissal of the case against Farmers & Merchants, your Honor? Mr. Johnstone is here from the Farmers & Merchants and, certainly, is to have the case dismissed as against him, when we have stipulated to do so and the court has ordered to do so.

The Court: If I ordered it dismissed once, doesn't that do it?

Mr. Stephens: If your Honor please,—

Mr. Green: I would like to answer the court, if I may.

Mr. Stephens: May I say this, if your Honor please, now: I don't think it has been clearly presented at this time. Your Honor provided in the order, the minute order, "It is ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach, signed by the court this date, be set aside and said dismissal not be filed."

Now, the effect, or, the law requires that for a dismissal to be effective—Rule 58—"The notation of a judgment in the civil docket as provided by

Rule 79(a) constitutes [36] the entry to judgment."

The same as to a dismissal. In other words, the dismissal must be entered. Your Honor ordered that the dismissal not be entered, and it has not been entered and it is not effective.

If I may suggest to the court that the judgment and the findings be set aside, as I have already argued, and then if they want to dismiss that party they are at liberty to do so. And I suggest that that is the proper way to proceed, in order to keep a clear record.

Mr. Green: There is no question of a clear record. They had a record they went on appeal with. The only question in this case is the one question, did they appeal properly? And apparently they didn't.

Now, at this time we move that the action as against the Farmers & Merchants Bank, that we stipulated to and that the court ordered dismissed, be dismissed and put in the record as dismissed, so there won't be any question about it.

The Court: All motions will be submitted.

Did you have something to add?

Mr. Johnstone: Your Honor, I think it has been pretty well argued. I had two observations to make.

The Court: Whom do you speak for?

Mr. Johnstone: Farmers & Merchants Bank. I am appearing for Walker & Horn. We, of course, want to see the dismissal [37] entered.

We have stipulated to it and I believe that for all purposes it is an effective dismissal. I think that it should be dismissed.

Your Honor, it would certainly clear up the record for the purposes of appeal. I have not heard any dispute between counsel on the facts as they were told to your Honor in the previous trial. I have no reason to believe that your decision would be any different if it were retried before you. Apparently, there are very small issues so far as facts are concerned. Certain things were done and pretty well agreed.

I wasn't here. I can only assume they were. This is a case where I believe two entirely different theories were stated in the complaint, but not separately stated.

I don't believe that the bank and the bonding company could both be responsible. It is a case, I feel, of necessity has to be severed. That is what evidently the upper court felt when they returned it, saying there was no compliance with Rule 54(b). They did not say it was not a proper case, they said there was no compliance, which merely takes a statement from your Honor there was no reason for delay and should be decided as to this one issue prior to a final determination.

I think that it has been made pretty clear by the plaintiff's counsel he wants to dismiss against the bank. The bank wants a dismissal entered. I believe it is an effective dismissal, [38] if not by written stipulation, certainly by a retraction.

I think it would clear up the record, your Honor, by allowing us to have the case dismissed so that the bonding company and the plaintiff can argue this out on appeal.

Mr. Green: I want to say one more thing, if I may, your Honor. At the last hearing this is what the court said:—we have a transcript of it that Mr. Stephens ordered——

Mr. Stephens: I never got it. Your Honor please, I don't know——

Mr. Green: ——and we got a copy after they had ordered it.

“I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind”, which of course they have not done.

You said, “My only purpose in withdrawing the dismissal is to preserve the status quo, so Mr. Stephens will not be prejudiced on appeal by any action taken here today.”

Mr. Stephens said that if you dismissed it, then the question for the time of his appeal might be prejudiced. [39] That is the only reason that the court said temporarily you would withhold it but would grant it at the next hearing.

The Court: Do you object to our dismissing it now?

Mr. Stephens: I have no objection to dismissing them, if we can first set aside the judgment and the findings.

Now, I want to make myself clear on that.

The Court: I can see your problem on that. But Mr. Green says I don't have jurisdiction to do that.

Mr. Stephens: I think Mr. Green is mistaken, if your Honor please, on it. And he hasn't cited any authority now. In other words, did this talk about my being responsible for the record and so forth, he is in error on that, because as far as the record, as to what went on with the Farmers & Merchants National Bank, it is all in the record, it was all printed. Show me if that is in error.

Mr. Green: I don't think you mean to make a misstatement to the court. Here is the record. It says here on page 95:

"Further discussion in regard to status and position of the Farmers & Merchants National Bank omitted at the request of counsel."

You didn't print that.

Mr. Stephens: I see what counsel has there, but that was all in the record; it wasn't printed. But it went up there as part of the transcript. [40]

Mr. Green: This is a transcript of the record, the printed thing, that is all the court concerns itself with.

The Court: That is what the court acts upon.

Mr. Stephens: That is what the court acts upon, that is correct.

Mr. Green: That wasn't in there.

Mr. Stephens: Here is the effect that Mr. Green wants to precipitate, your Honor please: If you grant the dismissal as to the Farmers & Merchants National Bank, it is Mr. Green's idea that at that point and immediately that a final judgment will then result from his dismissal, at which point, with-

out an opportunity to try this case again, we will have to then appeal on the record as it now is.

Now, I was going to call your Honor's attention to several things which have resulted in injustice in this trial, among other things, which is agreed in the reply brief of the appellees, that interest from June 1, 1949, to date of judgment was not proper.

And, as I pointed out very carefully in the opening brief, this has resulted in a judgment of \$231.63 in excess of anything that has any support, except an error, an obvious error in the record.

Now, if your Honor please, I think those things should be corrected. If your Honor is disposed to enter a judgment correcting those things, and let us be for our appeal, I am [41] willing to do so. But it seems to me that when we have something that your Honor can see out is erroneous, that no action should be taken by the court which would precipitate this.

Now, it might be that even if this dismissal were granted prior to the time that action was taken by the court, on the motion to set aside the judgment, it might be that the court could still set aside the judgment on a motion for a new trial or the like. But it seems to me we are duplicating and causing more difficulty, and your Honor has the jurisdiction and capacity and control over the case to do that in that order, and the Farmers & Merchants Bank would be properly represented. They have no interest whatsoever in the appeal or why or when we litigate the appeal. So I don't think their interests

are anything beyond getting dismissed. They could be dismissed just as well after your Honor has set aside the judgment as before.

Mr. Green: Your Honor, counsel points out this great mistake about \$231.63. We admit it in the brief. There is no error that needs to be corrected. We admit in our briefs that there was an error in addition and that is corrected already.

Mr. Stephens: On the interest.

Mr. Green: Counsel wants to get a new trial—all he is talking about is he wants another crack at it. They have [42] had two chances already. There must be an end to litigation some place.

Because they make a mistake and don't make a proper appeal, they then come to the court and say, "Give us a new trial so we can make a proper appeal."

The case has been decided, your Honor, so far as these defendants are concerned. We are satisfied, as the litigants in this case, to take our chances in the Court of Appeals. We will be satisfied if the Court of Appeals will rule correctly on it and that will be the end of the litigation.

Either your Honor was right on these two occasions, when the case was presented to you by Mr. McCall and when it was presented again by Mr. Stephens, or your Honor was wrong and the court will decide it.

If we have to try it another time and the court again has to make a decision, they then will appeal again and we have got the same situation all over again.

And as far as the Farmers & Merchants are concerned, you see, the only grounds they make their motion on for a new trial is on the basis that since we have to try the case against the Farmers & Merchants anyhow, we should have to try it against them, too. We don't want to try the case against Farmers & Merchants. That case has been dismissed. This court told us at the last hearing he would file the dismissal at this time. And he gave counsel every chance [43] to come up with something new to date.

They haven't filed a single new case or anything else in this matter. It seems to me that a case that has once been tried, motion for new trial has been had, it has gone upon appeal on this record and they didn't perfect their appeal, that now the only thing before this court, I submit, or the action that this court should take is to dismiss as to the Farmers & Merchants Bank and then if the court wants to also make a nunc pro tunc order saying there is no reason for delay, then if counsel wants to appeal he can appeal.

I am pretty certain that the Court of Appeals will agree to hear the appeal on the same record or have it submitted on the arguments that have already been made and the briefs that have been filed, and then we will get a decision on this litigation. The American Seating Company furnished this material some four or five years ago to help build a naval station, and hasn't been paid.

I mean, if there ever was a case crying out for justice—I agree that the American Seating Com-

pany won't go broke if they don't get their money, but that is not the issue. The thing is here is a supplier of material who furnished this material and the bonding companies got their premiums for protecting a payment bond and performance bond they furnished, and yet, instead of paying, as your Honor said, I couldn't understand why there were any defenses to this case. [44] And certainly Mr. Stephens hasn't shown the court any defense to the case yet.

I submit this court should at this time have the clerk order this dismissal as to the Farmers & Merchants Bank, and then if Mr. Stephens has any rights to appeal let him go ahead and appeal. I am satisfied the Court of Appeals would sustain.

The Court: All motions are deemed submitted now.

Mr. Green: Thank you, your Honor.

Mr. Stephens: Thank you, your Honor.

Mr. Johnstone: I have one more thing to say, your Honor. It is kind of a practical problem with us. Representing the bank, I believe that the dismissal is effective and we have auditors that come and look at the books of the bank, and they want to know what is going to happen to this case. We have to carry it as a contingent liability.

I believe a dismissal is proper and should be entered. It appears to me that Mr. Stephens is using the dismissal to keep us in the case for purposes of his own, not because there is any liability, but solely to have a weapon over Mr. Green's head.

I suggest, your Honor, our dismissal should be

entered and we could at least inform our auditors at our bank that no longer the case is pending and we can write it off or take the contingent liability off the books. [45]

The Court: What the court has heretofore said stands.

(Whereupon, at 2:25 o'clock p.m., Monday, January 16, 1956, an adjournment was taken.)

Friday, April 6, 1956, 3:04 p.m.

The Court: Call the case, please.

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Company, et al.

Hearing on defendants' motion for relief pursuant to Rule 60, F.R.C.P.

Mr. Stephens: Your Honor please, I am the moving party. Should I proceed?

The Court: Let's see who this gentleman is.

Mr. Tankel: I am Frederick Tankel. I am appearing for Mr. Green and Mr. Essey. They are both otherwise engaged this afternoon.

The Court: All right. You might tell us just what you want, Mr. Stephens. I think everyone is interested in getting this case in such a state that the appellate court will actually go ahead and determine the question which you undertook to present to it before.

Mr. Stephens: I just talked to counsel, if your Honor please, and I think that as to most of the motion which I am about to make—although I would like to call your Honor's attention to it, so that it will be in the record, as to why I am mak-

ing this—I think that he would probably be willing to stipuate to a large portion of it, which leaves one point in dispute, which I am not going to argue at length. But if I [49] may, I would like to point to two or three places in the record that warrant the motion under Rule 60(b), probably subsections 1 and 2, and also under subsection 6, which is the last part of my motion, which will meet the dispute.

The judgment, if your Honor please, contained two erroneous parts to it, as far as the amount is concerned. One is as to the date that interest starts to run. Counsel for plaintiff concedes in his brief on appeal, and I believe that counsel who is here today will stipulate that that was an error.

It also contains, through typographical error, as pointed out in the opening brief of the appellate, that there is a sum of money in excess of two hundred dollars—the exact amount doesn't come to mind—which was in the body of the judgment, so that it will require, if a new judgment is to be entered it will require a reduction of the judgment by that particular amount and also a recomputation of interest.

The Court: Should we not then simply file and enter a corrected judgment, from which your appeal would be taken, substitute it——

Mr. Stephens: I believe that is correct, your Honor. I think for record that the minute order should show, one, that the nunc pro tunc order which was entered on March 30th is recalled and set aside.

And, No. 2, that the judgment itself is recalled and set [50] aside.

And, three, that a new judgment is ordered entered, corrected judgment. Then I believe that I will have a clear record and we will be able to proceed on appeal.

The Court: What do you make of it?

Mr. Tankel: We have no objection to the effect of the motion made by Mr. Stephens. However, we just feel that the order *ex parte nunc pro tunc* was just surplusage in this case, because the order became final on the entry of dismissal against Glens Falls, I believe was the last defendant, which was the final adjudication.

Mr. Stephens: That is also my view, your Honor. I think we are in agreement on that, and it would be appropriate, since it was surplusage, to recall it and strike it.

The Court: All right. So ordered.

Mr. Stephens: Now, that is as to the points I have already made, is that true, your Honor?

The Court: Yes.

Mr. Stephens: Now, there is one other point which I wanted to bring before the court's mind and I am not going to labor it.

For some reason—I don't know why, because I wasn't here at the time of the trial—this case got off to a very inauspicious start and has had an inauspicious course, I think, throughout. [51]

Due to the fact that the so-called stipulated statement of facts and records were really a combination of the statements of the two counsel, and also

of exhibits and interrogatories which were propounded by the plaintiff, it has been my view, after careful study of the case, that a number of the factual issues of the case have been obscured by simply the way that it has been brought up.

I have therefore tried earnestly and respectfully, in the best way that I could, on several occasions to urge the court to set aside, not only the judgment, but the findings of fact and conclusions of law, and set the case for trial and enable me to put to the plaintiff certain interrogatories, with which I had thereby hoped to clear up the record.

For example, it was argued in the brief on appeal of appellee's, which appears on page 25, the following statement:

“It was unnecessary for the trial court to make a special finding that the plaintiff offered to sell and supply said materials to E. F. Grandy, Inc., since the appellee did make an offer in its purchase order, which was approved by E. F. Grandy, Inc., and forwarded to the United States Naval Base.”

Now, your Honor please, that statement is not supported by the record in any respect. I pointed that out on the briefs on appeal, and we will do that again if that is the course which I must take.

But I noted in the argument which was made to your Honor at the time the case was submitted, and in the memorandums on pretrial and the memorandums that were subsequently submitted to your Honor prior to decision, that that statement is constantly repeated. And I think counsel for appellee must think it is there, but I submit the record

doesn't show it and if I were to ask him for an admission as to that fact he would be compelled to admit that that is not true, which would point that out.

I am not now going to go over any other points. But there are several points that are similar to that.

I also was impressed by your Honor's statement, when we argued the motions, that have now been settled, on January 16, 1956, and the court said on page 34 of the transcript:

"What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, as far as getting things over to me was concerned, just didn't get them over.

"The defense points, both as to the facts and as to the law, were such that I felt the man was just talking in circles, and I left the bench confused as to why he was defending the case. And since you had stated a good case for your client I granted judgment.

"Now, since then the attorney who presented a [53] confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides, instead of only by your side."

Now, I was impressed by that, that your Honor felt in his own consciousness that the case had never really been presented, that your Honor had never had an opportunity to weigh those facts, un-

clouded by an already established judgment, findings of fact and conclusions of law.

Now, Mr. Green's argument up to now has been that I have had an opportunity to so argue the case and so present it. I earnestly represent to the court that I have not had such an opportunity.

It has been unfortunate, but I have always been compelled — and rightfully so — to address my remarks and my motions and the things that I urged the court to do, to the problem of setting aside those findings of fact and conclusions of law and the judgment, to enable me to get to that point.

Now, I believe if your Honor feels that way now he could set aside, under Rule 60(b), subsection 6, the judgment. The rule provides:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:” [54]

And then it lists six reasons.

No. 6 says: “Or any other reason justifying relief from the operation of the judgment.”

And I submit to your Honor that that would be justifiable as a reason for relief in the operation of the judgment.

That is all I wish to say. If your Honor feels, as I think he may have indicated before, that he has decided the case and it should now go to the Ninth Circuit, and I appreciate counsel's willingness to stipulate to the order which your Honor has made with respect to correction of the judgment, and giving me an opportunity to appeal without the

question of the time within which I could appeal.

Thank you.

The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.

Parties who come into the court must get their cases properly presented at the trial, and there must be a finality to decisions, having once found—and I see no reason to think I was wrong—that there was liability here. Although there was an error in the computation, that has now been corrected by stipulation. [55]

I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, than you would try it.

But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.

So I deny the present motion.

Mr. Stephens: May I ask the court as to the time for preparation of this new order. Perhaps counsel and I could do so quickly.

Are you planning to leave for Sacramento tomorrow?

The Court: I am planning to leave for Sacramento on Sunday. But the order, which I take it from the way you have been getting along now, will be one that you will be able to agree to as to form,—

Mr. Stephens: I think we could.

The Court: —and it can be quickly sent to Sacramento, and I would sign it there so it could be promptly entered. I think this case should get on.

Mr. Stephens: I do, too. I am concerned about that, your Honor.

Perhaps we can compute the interest. I think that is the [56] only problem. And use the same form of judgment, I assume, because it is counsel's choice as to judgment, of course.

The Court: If you wish, you may come back to chambers and my secretary can help you. You can get it reduced to form so it might be signed today and entered immediately, if you are in position to do that.

Mr. Tankel: I would hesitate to do that right now, your Honor. I would like to have Mr. Green and Mr. Essey see it. I am a kind of a last-minute substitution here.

The Court: Bearing in mind the case from the plaintiff's standpoint, it has been Mr. Green's responsibility—

Mr. Stephens: I agree.

The Court: —perhaps you had better work it out either tomorrow or Monday. And if you bring it in, leave it with our clerk and he will immediately

forward it to the District where I will be sitting, and it will be given immediate attention.

Mr. Stephens: Thank you, your Honor.

Mr. Tankel: Thank you very much, your Honor.

(Whereupon, at 3:25 o'clock p.m., Friday, April 6, 1956, an adjournment was taken.)

[Endorsed]: Filed May 1, 1956.

[Endorsed]: No. 15,164. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, Appellants, vs. American Seating Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 25, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,258

GLENS FALLS INDEMNITY COMPANY, a
New York corporation, and E. F. GRANDY,
INC., a California corporation,
Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jer-
sey Corporation, Appellee.

SUPPLEMENTAL DESIGNATION OF POINTS
ON WHICH APPELLANTS INTEND TO
RELY ON APPEAL AND DESIGNATION
OF THE RECORD WHICH IS MATERIAL
TO CONSIDERATION OF APPEAL

Pursuant to Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17, Appellants herein make a concise statement of the points on which Appellants intend to rely and designate the record which is material to the consideration of the appeal.

Points on Which Appellants Intend to Rely

1. Appellants intend to rely upon all of the points designated in the Transcript of Record heretofore printed in this case, pages 178 to 187, inclusive.

2. Appellants intend to rely upon the further point that the trial court committed reversible error in denying motion made by Appellants in the trial

court under Federal Rule of Civil Procedure 60(b)(6).

Designation of the Record Which Is Material To Consideration Of Appeal

Appellants have filed with the Clerk of the District Court their designation of record to be transmitted to the Court of Appeals. Such designation was made pursuant to Federal Rules of Civil Procedure, Rule 75, and included the whole record because it is the position of Appellants that nowhere in the record is there a foundation for certain findings. It is therefore necessary that the whole record be available to the Court of Appeals.

However, this Designation of the Record Which is Material to Consideration of Appeal is intended to include only such portions of the record which Appellants believe may be reasonably expected to be referred to in the briefs. Accordingly, Appellants respectfully request that the portions of the record heretofore designated in the Designation of the Record Which is Material to Consideration of Appeal originally filed in this action be the portion of said record which Appellants designate to be printed and that in addition thereto, the following record be printed:

Reference to page is reference to page number of the record on appeal as certified by the Clerk of the District Court.

1. Mandate of the Court of Appeals for the Ninth Circuit filed December 13, 1955. Page 216.

2. Motion to Set Aside Judgment, Findings of

Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated September 29, 1955 and filed September 30, 1955. Page 198.

3. Notice of Motion to Amend Judgment Nunc Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities (filed by plaintiff) dated October 18, 1955 and filed October 24, 1955. Page 206.

4. Minute Order dated October 14, 1955 continuing hearing on motions, to October 31, 1955. Page 205.

5. Substitution of Attorneys, substituting Burnett L. Essey and Irving H. Green as attorneys of record for plaintiff instead of Wolfson & Essey and Irving H. Green dated October 21, 1955, filed October 24, 1955. Page 212.

6. Minute order dated October 31, 1955. Page 215.

7. Stipulation for Dismissal of Farmers & Merchants Bank of Long Beach, dated October 31, 1955, and Order thereon dated October 31, 1955, filed and docketed March 23, 1956. Page 218.

8. Minute Order dated January 16, 1956. Page 217.

9. Nunc Pro Tunc Order Amending Judgment of June 9, 1953, filed and docketed March 30, 1956. Page 196, 220.

10. Notice of Entering Nunc Pro Tunc Order. Page 197.

11. Motion for Relief Pursuant to F.R.C.P. 60, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion and Order Shortening Time (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, filed April 4, 1956. Page 221.

12. Ex Parte Motion for Stay of Execution Pursuant to F.R.C.P. Rule 62(b) (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, and Order thereon, filed and docketed April 4, 1956. Page 229.

13. Notice dated April 4, 1956 that Order for Stay of Execution of Judgment docketed and entered April 4, 1956. Page 230.

14. Minute Order dated April 6, 1956. Page 231.

15. Judgment dated April 17, 1956 and entered April 18, 1956. Page 232.

16. Notice dated April 18, 1956 that Judgment docketed and entered April 18, 1956. Page 234.

17. Notice of Appeal by Glens Falls Indemnity Company and E. F. Grandy, Inc., dated April 19, 1956, filed April 20, 1956. Page 235.

18. Supersedeas Bond of Glens Falls Indemnity Company dated April 20, 1956 and filed April 20, 1956. Page 237.

19. Ex Parte Application to File Supersedeas Bond dated April 23, 1956 and Order thereon, all filed April 23, 1956. Page 241.

20. Supersedeas Bond of E. F. Grandy, Inc., filed April 23, 1956. Page 243.

21. Designation of Record on Appeal. Page 247.

22. Reporter's Transcript of Proceedings, October 31, 1955.

23. Reporter's Transcript of Proceedings, January 16, 1956.

24. Reporter's Transcript of Proceedings, April 6, 1956.

It is the intention of Appellants and Appellants do hereby respectfully request that the original printed Transcript of Record on Appeal be used and that in addition thereto there be printed a supplemental Transcript of Record on Appeal consisting of all of the portions of the Record hereinabove designated, which portions have not already been printed.

Dated: May 28, 1956.

Respectfully submitted,

JOHN E. McCALL and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1956. Paul P. O'Brien,
Clerk.

No. 15,164

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

APPELLANTS' SUPPLEMENTAL OPENING BRIEF.

ALBERT LEE STEPHENS, JR., and
JOHN E. MCCALL,

535 Rowan Building,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellants.

FILED

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PAUL P. O'BRIEN, C

TOPICAL INDEX

THIS
BRIEF
PAGE

I.

- Statement of the pleadings and facts disclosing jurisdiction..... 2
(Original Appellants' Opening Brief, p. 1)

II.

- The nature of the proceedings in the trial court..... 3
(Original Appellants' Opening Brief, p. 2)

III.

- Statement of facts..... 7
(Original Appellants' Opening Brief, p. 5)

IV.

- Questions involved and the manner in which they are raised..... 8
(Original Appellants' Opening Brief, p. 13)
1. Was there either an express or an implied contract between American Seating Company and appellants, or either of them?
(Original Appellants' Opening Brief, p. 14)
 2. Has the contractor obligated itself to perform the contract obligations of its subcontractor by accepting a surety bond as obligee thereunder?
(Original Appellants' Opening Brief, p. 15)
 3. Where there is a performance bond and a separate payment bond, is the obligation of the surety on the performance bond void upon the performance of the contract, even though the materialmen have not been paid?
(Original Appellants' Opening Brief, p. 15)
 4. If the parties to a common law payment bond intended it solely as a protection against loss or damage to the obligee, is a stranger to the bond entitled to recover against the surety?
(Original Appellants' Opening Brief, p. 16)

5. On a bond conditioned against loss or damage to the obligee, as distinguished from a bond conditioned against liability, does the surety incur liability before the obligee has actually suffered such loss or damage?
(Original Appellants' Opening Brief, p. 16)
6. This point no longer applicable.
7. Has the trial court abused its discretion in denying relief from the judgment under Federal Rule of Civil Procedure 60(b)(6) when it appears that the court rendered judgment without understanding the whole case?..... 8

V.

Specification of error relied upon..... 8
(Original Appellants' Opening Brief, p. 17)

1. Judgment against appellant Glens Falls Indemnity Company and E. F. Grandy, Inc., or either of them, cannot be predicated upon the common law performance bond.
(Original Appellants' Opening Brief, p. 17)
2. Judgment against appellants Glens Falls Indemnity Company and E. F. Grandy, Inc., or either of them, cannot be predicated upon the common law payment bond.
(Original Appellants' Opening Brief, p. 20)
3. Judgment against appellant Glens Falls Indemnity Company cannot be predicated upon a contractual relationship between appellee American Seating Company and appellant Glens Falls Indemnity Company.
(Original Appellants' Opening Brief, p. 22)
4. Judgment against appellant Glens Falls Indemnity Company cannot be predicated upon a contractual relationship between appellee American Seating Company and appellant E. F. Grandy, Inc.
(Original Appellants' Opening Brief, p. 22)

5. Judgment against appellant E. F. Grandy, Inc., cannot be predicated upon a contractual relationship between appellee and appellant E. F. Grandy, Inc.

(Original Appellants' Opening Brief, p. 23)

6. The findings of fact and conclusions of law are vague and indefinite and inadequate to disclose the factual or legal basis for the judgment and are inherently inconsistent because they cannot be interpreted in any manner which would result in joint legal liability of appellants.

(Original Appellants' Opening Brief, p. 24)

7. This point is no longer applicable.

8. The findings are unsupported by the evidence in the following additional material respects.

(Original Appellants' Opening Brief, p. 25)

9. Appellants intend to rely upon the point that the trial court committed reversible error in denying motion made by appellants in the trial court under Federal Rules of Civil Procedure 60(b)(6).....

9

VI.

Summary of argument..... 9

(See also Introduction to Argument, original Appellants' Opening Brief, p. 25)

VII.

Argument..... 12

(Original Appellants' Opening Brief, p. 28)

1. There was neither an express nor an implied contract between American Seating Company and appellants, or either of them.

(Original Appellants' Opening Brief, p. 28)

- A. There was no privity of contract between American Seating Company and Grandy, Inc., and there was nothing from which a contract could be implied.

(Original Appellants' Opening Brief, p. 28)

- (a) There is no evidence of an oral or written contract.

(Original Appellants' Opening Brief, p. 28)

- (b) No contract may be implied from the conduct of the parties; and Grandy, Inc., has paid the full subcontract price and therefore has not been unjustly enriched.

(Original Appellants' Opening Brief, p. 31)

- B. There was no privity of contract between American Seating Company and Glens Falls and there was nothing from which a contract could be implied.

(Original Appellants' Opening Brief, p. 33)

- C. Glens Falls is not surety to protect Grandy, Inc., from loss or damage resulting from failure of Grandy, Inc., to perform its own contract.

(Original Appellants' Opening Brief, p. 33)

2. By accepting a common law surety bond as obligee thereunder, the prime contractor, Grandy, Inc., has not obligated itself to perform the contract obligations of its subcontractor.

(Original Appellants' Opening Brief, p. 35)

3. Where there is a performance bond and a separate payment bond, the obligation of the surety on the performance bond is void upon the performance of the contract, even though materialmen have not been paid.

(Original Appellants' Opening Brief, p. 36)

4. American Seating Company was a stranger to the common law payment bond and is therefore not entitled to recover against the surety because at the time the bond was executed the parties thereto intended it solely as a protection against loss or damage to the obligee, Grandy, Inc.

(Original Appellants' Opening Brief, p. 40)

5. A surety incurs no liability on a bond conditioned against loss or damage to the obligee, as distinguished from a bond conditioned against liability, until the obligee has actually suffered such loss or damage.

(Original Appellants' Opening Brief, p. 44)

6. This point is no longer applicable.

7. When the judge of the trial court recognized and acknowledged that he had never understood the appellants' side of the case (the defense to the action) and thought that appellants' counsel who was before the court could present such defense so that it could be understood, it was an abuse of discretion and error to refuse to grant relief from the judgment under F. R. C. P. 60 to permit the presentation of the defense..... 12

Conclusion 18

(Original Appellants' Opening Brief, p. 48)

The nature of the proceedings in the trial court.....App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350.....	16
Charles v. Norfolk & Western Ry. Co., 188 F. 2d 691, cert. den. 342 U. S. 831.....	16
Citizens National Bank of Lubbock v. Spear, 220 F. 2d 889....	16
Garrison v. United States, 62 F. 2d 42.....	16
Klapport v. United States, 335 U. S. 601.....	6, 15
Magee v. General Motors Corp., 213 F. 2d 899.....	16
United States v. United States Gypsum Co., 333 U. S. 364.....	18

RULES

Federal Rules of Civil Procedure, Rule 54(b).....	1
Federal Rules of Civil Procedure, Rule 59	12, 16
Federal Rules of Civil Procedure, Rule 60....	4, 11, 12, 13, 14, 15
Federal Rules of Civil Procedure, Rule 60(b).....	13, 14, 15
Federal Rules of Civil Procedure, Rule 60(b)(6).....	8, 9
Federal Rules of Civil Procedure, Rule 77(d).....	12

STATUTE

United States Code Annotated, Title 28, Rule 60, p. 312.....	14
--	----

TEXTBOOK

7 Moore's Federal Practice, p. 236.....	14
---	----

No. 15,164

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

APPELLANTS' SUPPLEMENTAL OPENING BRIEF.

An appeal was docketed in this case under number 14,258. A transcript of record was filed and the following briefs were filed: Appellants' Opening Brief, Appellee's Answering Brief and Appellants' Reply Brief. The case was argued and submitted. The appeal was dismissed as premature because the judgment did not dispose of the whole case nor conform to F. R. C. P. 54(b) (see 225 F. 2d 838). After the remittitur was filed, Appellee, which is the plaintiff, dismissed the party concerning which the judgment was silent.

The case is before the court again on the original record plus the record of the intermediate proceedings. Pursuant to stipulation and with the consent of the court, the original Transcript of Record and the original briefs will again be used. A Supplemental Transcript of Record has been prepared and the original briefs are to be supplemented as required. For this reason, reference will be made to the original Transcript of Record as "R." and to the Supplemental Transcript of Record as "Sup. R."

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

The statement contained in the original Opening Brief is complete on this subject except for the fact that Appellee dismissed as to The Farmers and Merchants Bank of Long Beach, which is no longer a party to the action. It appears to Appellants that the judgment which had been the subject of the earlier appeal became final when the order of dismissal was entered because it was then determinative of all of the issues as to all of the parties remaining in the case. Appellants' appeal from this judgment out of abundance of caution although it was later set aside and a new judgment in a different amount was entered. Appellants also appeal from this later judgment and they believe that this is the true final judgment in the action. The court is respectfully referred to the original Opening Brief for the jurisdictional statement (App. Op. Br., Sec. I, pp. 1 and 2).

II.

The Nature of the Proceedings in the Trial Court.

The proceedings in the trial court were confused from the beginning and continued so to the end.

After the Court of Appeals had determined that the judgment was not final and had returned the case to the trial court, Appellants moved to set aside the findings of fact, conclusions of law and judgment and to set the case for trial. At this time the full import of the confusion which had accompanied the case became apparent. Judge Tolin said that he would like to grant the motion [Sup. R. 68, 76-77]:

“ . . . upon the presentation you have made and upon my own examination of the file I am inclined to set aside the findings . . . heretofore made, and set the case for trial. But if you have something, you are asking for something more, we will hear it.”

and the Judge gave his reasons:

“The Court: What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, so far as getting things over to me was concerned, just didn't get them over. The defense points, both as to the facts and as to the law, were such that I felt the man was just talking in circles and I left the bench confused as to why he was defending the case, and since you had stated a good case for your client, I granted judgment.

“Now, since then the attorney who presented a confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides instead of only by your side.”

The events leading up to this expression and the events following are set forth in sufficient detail in the Appendix to this brief and commented upon in the first point of Argument in this brief. An understanding of the confounded confusion cannot be conveyed in a word. Reference to the record itself or to the Appendix is necessary for an understanding of Appellants' first point of Argument. An abbreviated statement of the nature of the proceedings in the trial court appears in Appellants' original Opening Brief at pages 2 through 5 (Section II).

After the case was returned by the appellate court to the trial court, Appellants became convinced that the tangle of the record as evidenced by the remarks of the Judge quoted above was never sufficiently unraveled by the trial court to enable that court to determine the direction of the evidence or to follow the course of the legal argument and that the contradictions in the findings and the other errors upon which the appeal is based spring directly from this fact.

Accordingly, when the appellate court returned the case to the trial court, Appellants filed a motion to set the judgment, findings and conclusions aside, but this was never ruled upon. Instead the court ordered that the dismissal of the Farmers and Merchants Bank of Long Beach should be entered. This rendered the judgment final by eliminating the party not mentioned in the judgment. About ten days later the judge signed another order affecting the judgment as though the dismissal of the Bank had not been ordered. These actions were so inconsistent that Appellants conceived them to be inadvertent and moved for relief under Rule 60.

At the time of the argument of this motion, Appellee conceded that the judgment was in error as to amount and as to interest and stipulated that these obvious errors,

which had been many times pointed out should be corrected and that the order signed after the Bank had been dismissed should be recalled and set aside. Accordingly, the order referred to was recalled and set aside and the judgment itself was set aside and a new one was entered. But this did not cure the fundamental errors or in any way indicate that the Judge had reviewed the evidence, studied the appellate briefs or otherwise reconsidered the questions of law.

In fact, there is no indication that the court attempted to review the case in a manner to dispel the confusion which existed throughout down to the very day of this argument. On the contrary, the only relief afforded was pursuant to stipulation. The balance of the relief requested was denied as follows:

“The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.

“Parties who come into court must get their cases properly presented at the trial, and there must be a finality to decisions, having once found—and I see no reason to think I was wrong—that there was liability here. Although there was an error in the computation, that has now been corrected by stipulation.

“I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, than you would try it.

“But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and

selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.

“So I deny the present motion.” [Sup. R. 93.]
(Emphasis added.)

Appellants’ counsel did not suggest to the court that a new hearing should be granted because a new lawyer had come into the case or because a different method of presenting the defense was desirable or that Appellants wanted to base the defense on either new theories or new facts or a new or different selection of matters to be brought before the court. Appellants wanted and still want only one thing, that the court deciding the case should understand the defense.

The point of the argument had been that the basis of decision should be an abiding conviction that one side is right and that no such conviction can be born unless the court understands both sides of the case. Further, the point had been that when the Judge realizes that he does not understand one side, he should make every effort to remedy this situation by granting further hearing if necessary.*

The Judge himself had been the one to suggest that the attorney before him might be able to clarify the defense. Then he denied the opportunity, apparently thinking that having once given judgment, he had no right to reopen the case. The fact that the confusion

*“ . . . In simple English, the language of the ‘other reason’ clause (of F.R.C.P. 60) of all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” (*Klapport v. United States* (1948), 335 U. S. 601, 93 L. Ed. 266.)

which the Judge had confessed had not been overcome appears from the fact that he relied upon having no reason to think that his original decision was wrong rather than to find reason that he was right. Of course, since he did not understand the defense, he would not see reason to think that he was wrong unless he reviewed the matter as requested.

Appellants contend that it is an abuse of discretion to deny the relief requested when the trial court is fully aware that the decision was made because of a lack of understanding of a part of the case rather than because of an abiding conviction that the other side is right and should in justice prevail.

III.

Statement of Facts.

Appellants' original Opening Brief contains a statement of facts. See pages 5 through 13. The error referred to on page 12 of that statement was reflected in the judgment which was subsequently corrected when a new judgment was substituted.

Appellee included a statement of facts in its original Answering Brief at pages 1 and 2 thereof. Nothing in this statement conflicts with Appellants' statement except two often repeated false statements, to wit: (1) The specifications required that certain materials be purchased from Appellee. This is not supported by any reference to the record and in fact the record does not show that this is true. (2) The prime contractor (Appellant) forwarded the purchase order of the subcontractor to Appellee. As a matter of agreed fact, the subcontractor sent the order directly to Appellee.

These erroneous statements are particularly dealt with at pages 1 and 2 of Appellants' original Reply Brief. The court is respectfully referred to the statements of fact above referred to.

IV.

Questions Involved and Manner in Which They Are Raised.

The questions involved and the manner in which they are raised are set forth in the original Appellants' Opening Brief at pages 13 to 16, inclusive. Question number 6 has been eliminated by the entry of a new judgment.

In addition to these questions, another question was raised which for convenience will be numbered 7.

7. Has the trial court abused its discretion in denying relief from the judgment under Federal Rules of Civil Procedure 60(b)(6) when it appears that the court rendered judgment without understanding the whole case?

This question is raised by motion for relief from said judgment [Sup. R. 19-24] and by Supplemental Designation of Points on which Appellants Intend to Rely [Sup. R. 96-97].

V.

Specification of Error Relied Upon.

Specification of error relied upon appears in the original Appellants' Opening Brief at pages 17-25, inclusive. Of these eight specifications, number 7 is no longer an issue, having been eliminated by a judgment substituted for the original one.

An additional specification of error which will be numbered 9 for convenience is as follows:

9. *Appellants intend to rely upon the point that the trial court committed reversible error in denying motion made by Appellants in the trial court under Federal Rules of Civil Procedure 60(b)(6).*

VI.

Summary of Argument.

(See Introduction to Argument in original Appellants' Opening Brief, pp. 25-27.)

Appellee states that the basic issue involved is: Has the surety obligated itself to the materialmen by the two common law bonds which it supplied? (Appellee's Ans. Br. p. 5.) The answer to this is that it has not. The bonds do not so provide nor was it the intention of the parties to protect the materialmen by these two bonds.

One bond was a Performance Bond and the other was a Payment Bond. They were both given by the subcontractor to protect the prime contractor. An accepted rule of construction and interpretation of contracts is that they will be so construed as to give meaning to every part. The two bonds construed together clearly indicate an intention to separate performance of the contract as such from payment of materialmen. Both the respective titles and the provisions of the bonds indicate this. If any meaning is to be ascribed to their designations, this is the meaning that must be recognized.

Proceeding upon this premise, the Performance Bond has been discharged because it is conceded that the work was completed and accepted by the Government as fully complying with the contract and its specifications. We then turn to the Payment Bond and find that it is conditioned in a manner expressly recognized by the California Civil Code. The surety is not liable there-

under unless the obligee, the prime contractor, suffers loss or damage as a result of the subcontractor's failure to pay his materialmen. The bond does not obligate the surety to pay the materialmen if the subcontractor does not. It only obligates the surety to *reimburse* the prime contractor for what he is compelled to pay to the materialmen *by reason of his Government contract, or subcontract.*

The prime contractor cannot be compelled to pay the materialmen because his contract with the Government does not obligate him to do so nor does his contract with the subcontractor. The Government contract required the prime contractor to protect the materialmen by posting a Miller Act Bond, but Appellee slept upon its rights and let the statutory time for asserting a claim lapse. So there is no way that the prime contractor is legally responsible to the Appellant materialman. Therefore, he can't suffer loss or damage as a result of the Government contract and as a consequence the surety can't be liable on the Payment Bond.

Both bonds are therefore eliminated because clearly they were never intended to assure payment to the Appellant materialman. On the contrary, they were exclusively for the protection of the prime contractor. Since he was not hurt, the surety is not liable.

In cases where only one bond has been furnished, labeled a Performance Bond, the courts have held that the surety has made itself responsible for the full performance of the contract including payment for materials used. The courts pointed out that the intention of the parties as ascertained from the surety contract determined this result. They had not enunciated a rule of law applicable to all so-called Performance Bonds. They had

ascertained intention and wherever the contrary intention appears the contrary result obtains.

Appellee speaks of relying upon an express or implied contract which creates liability to Appellee. Clearly the only possible source of such contractual relationship with the surety lies in the bonds which contain neither express provision for benefit of Appellee nor implication of liability. The bonds were written in connection with the prime Government contract and the subcontract. They do not relate to any other contracts or agreements and the surety could not be responsible for the performance or non-performance of any other contracts.

If the prime contractor made any agreements outside of the prime or subcontracts, the surety could not be held for their performance or non-performance. It is, therefore, manifest that if the prime contractor made any on-the-side agreements with the Appellee, the surety is not concerned with their performance or non-performance. Liability of the prime contractor on such contracts does not render the surety responsible.

There is a vague and indeterminable contention of express or implied obligation of the prime contractor, independent of the prime contract, the subcontract and the two bonds. Appellee has pointed to no evidence of this. The existence of this contention and the failure to abandon it in argument compels Appellants to meet these collateral issues.

The case may be reduced to the simple statement that there is absolutely no evidence in the case to support the judgment entered by the trial court. We have not undertaken to summarize the brief argument that the trial court should have granted relief from the judgment under F. R. C. P. Rule 60.

VII.

Argument.

Appellants respectfully refer the court to the original Appellants' Opening Brief commencing at page 28 for points 1, 2, 3, 4 and 5 of Argument. The points made appear in the index of this brief with page reference to the original Opening Brief. Point 6 is no longer applicable, having been corrected by the entry of a new judgment. Point 7 is new.

7. **When the Judge of the Trial Court Recognized and Acknowledged That He Had Never Understood the Appellants' Side of the Case (the Defense to the Action) and Thought That Appellants' Counsel Who Was Before the Court Could Present Such Defense so That It Could Be Understood, It Was an Abuse of Discretion and Error to Refuse to Grant Relief From the Judgment Under F. R. C. P., Section 60, to Permit the Presentation of the Defense.**

The judgment from which this appeal is taken was entered on June 9, 1953, but did not become final until March 23, 1956. On that date the Clerk docketed the dismissal of the Farmers and Merchants Bank of Long Beach. No notice of the docketing of the dismissal was given to the parties as required by F. R. C. P. 77(d). As a consequence the time within which Appellants could make a motion under Rule 59 to set aside findings of fact and conclusions of law and judgment and to set the matter for trial expired before Appellants discovered that the judgment had become final. Appellants' only recourse was to seek relief under Rule 60.

Appellants' motion under Rule 60 urged four points:

(1) That the *ex parte, nunc pro tunc* order of March 30, 1956, be recalled and set aside;

(2) That the findings of fact and conclusions of law and judgment be recalled and set aside; and

(3) A new judgment be entered; or

(4) The matter be set for trial.

The District Court recalled and set aside the *nunc pro tunc* order of March 30, 1956 and the judgment and ordered that a new and corrected judgment be entered. The trial court refused to set aside the findings and conclusions and to set the case for trial.

At the time of the hearing on Appellants' motions the District Court stated that it had never understood the Appellants' case and that it would like to hear a presentation of the defense. The court then denied Appellants' motions. It would appear that the court felt that justice would be better served by setting aside its judgment and granting a new trial, but believed that it lacked the power to do so.

But the District Court did have jurisdiction to grant Appellants' motion, and should have done so.

Rule 60(b) provides in part as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment."

The Notes of Advisory Committee on Amendments to Rules make the following comment with reference to the above quoted portion of Rule 60(b):

“The qualifying pronoun ‘his’ has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc.” (28 U. S. C. A. Rule 60, p. 312.)

1946 revision of Rule 60. Professor Moore comments on the effect of the change as follows:

“The 1946 revision of 60(b) deleted the qualifying phrase *his*, abolished for civil actions the old common law and equitable remedies, and particularized the categories under which relief could be had. As a result of the deletion of the pronoun *his*, relief for mistake, inadvertence, etc. was extended to include not only the mistake of the moving party, but also the mistake of the adverse party, third persons, and even the court.” (7 Moore’s Federal Practice 236.)

and concludes that:

“ . . . While there is some judicial authority that may be *contra*, we believe that there should be sufficient flexibility in the Rules so that the district court had the power under 60(b)(1) to grant relief for error of law apparent, on motion made within a reasonable time.” (*Idem*, p. 237.)

In addition to clause (1) of Rule 60(b), discussed above, which provides for relief from mistakes of law by the court, there is another clause which is most applicable to the unusual situation presented by the instant case.

Clause (6) of Rule 60(b) provides for relief from a final judgment for “any other reason justifying relief from the operation of the judgment.”

The United States Supreme Court has interpreted Clause (6) as a broad grant of power to a trial court to grant relief from a final judgment whenever justice so requires.

In *Klapport v. United States* (1948), 335 U. S. 601, 93 L. Ed. 266, the Supreme Court reversed the trial court's denial of a motion to set aside a default judgment in a proceeding to revoke a certificate of naturalization. The motion was made some four years after the judgment on the ground that defendant was imprisoned shortly after the complaint was filed and was without funds to retain an attorney to represent him. The Supreme Court stated (335 U. S. 614-615, 93 L. Ed. 277):

“ . . . In simple English, the language of the ‘other reason’ clause of all other reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”

It is respectfully submitted that the erroneous findings of fact and conclusions of law resulted from the trial court's admitted confusion and that the situation here presented, where the trial court admits that it was confused and that it is inclined to set aside the findings and grant a new trial [Sup. R. 68, 76, 77], but fails to do so, apparently on the belief it had no power to, is clearly within the scope of Clause (6) of Rule 60(b) and that the trial court erred in denying Appellants' motions.

Since Appellants' motion under Rule 60 to set aside the findings and conclusions is analogous to a motion

under Rule 59, the cases decided under the latter rule deserve consideration.

In a motion for a new trial, the trial court has the discretionary power to reweigh the evidence and it is its duty to exercise that power to prevent a miscarriage of justice.

Garrison v. United States (4th Cir., 1932), 62 F. 2d 42, 43;

Aetna Casualty & Surety Co. v. Yeatts (4 Cir. 1941), 122 F. 2d 350, 354;

Citizens National Bank of Lubbock v. Spear (5th Cir., 1955), 220 F. 2d 889.

In *Magee v. General Motors Corp.* (3rd Cir., 1954), 213 F. 2d 899, the Third Circuit reversed an order of a District Court denying a motion for a new trial and directed the lower court to reconsider the motion where the latter mistakenly believed it had no power to reweigh the evidence in ruling on the motion.

In *Charles v. Norfolk & Western Ry. Co.* (1951), 188 F. 2d 691 (Cert. den. 342 U. S. 831), the Seventh Circuit reversed the trial court's denial of a motion for a new trial, stating at page 695:

"Of course, it is true that ordinarily the granting or refusing of a new trial, being a matter within the discretion of the trial judge, is not subject to review. (Citing cases) But in the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in any similiar situations, (citing case)."

It is apparent from the record that the judgment in this case was not founded upon a "conviction resulting from examination of the proceedings in their entirety."

It is the duty of the trial court to consider the case in its entirety and to come to a conclusion that one side is right. Even though the case is close and hard to decide and even though the deciding factor might be very slight, the court should be convinced that right is on the side of the prevailing party. If all things are equal and there is no factor on one side which tips the scale, then it is the duty of the court to decide for the defendant. A decision for the plaintiff must originate in an affirmative moral conviction that the plaintiff is right. A judgment for the plaintiff is not warranted by the fact that the judge can see no reason to think that the plaintiff was wrong.

While the decision of a trial court may be based upon some small factor, the appellate court arrives at its decision by a process which is almost the reverse. Fundamentally, it must assume that the trial court has functioned properly and that the record may not reflect the factors of decision in absolute perspective. Consequently if there is substantial evidence in support of the judgment, it will not be disturbed on appeal.

When the trial court recognizes that it did not understand one side of the case, and at the same time has before it the means and opportunity for understanding, it acknowledges that it has not properly performed its function. It is an abuse of discretion to refuse to take whatever step may be required to properly fulfill its function.

This should not be passed on to the appellate court. But when it has been passed on to the appellate court as in this case, the appellate court should recognize that the usual assumption that the trial court has functioned properly cannot be indulged. We think that two courses are open: (1) to order the trial court to hear the case, or (2) decide it as the trial court would.

We respectfully urge that the judgment should not be sustained for the reasons just discussed and further that it was an abuse of discretion and reversible error for the trial judge to refuse relief from the judgment in the circumstances. However, there was no testimony taken in the trial court. There were no factors which are not now fully presented by the existing record. The transcript is short. The facts have been thoroughly analyzed and the law fully discussed. The appellate court will of necessity come to grips with the entire case to decide the appeal on its merits. When these conditions exist, fairness and justice, including economy to court and litigants, make it appropriate for the appellate court to reconsider the entire case from the point of view of a trial court and decide it (*United States v. United States Gypsum Co.*, 333 U. S. 364, 397).

Conclusion.

Fundamentally, fairness and justice are based upon simple rules, and simple rules are applicable to this case. The first one is that parties to a private contract are not liable except according to its terms. In this respect surety contracts are not different from other contracts. The terms of the surety contracts in this action do not protect American Seating Company from loss. The second simple principle applicable in this action is that

judgment must be predicated upon an affirmative preponderance of right when all of the case is considered. A judgment based upon only one side of the case should be set aside.

On both principles the judgment should be reversed. Because there is no evidence upon which liability of Appellants can be predicated, the judgment should be reversed with instructions to enter a judgment against Appellee.

Respectfully submitted,

JOHN E. McCALL, and

ALBERT LEE STEPHENS, JR.,

By ALBERT LEE STEPHENS, JR.,

Attorneys for Appellants.

APPENDIX.

Supplementing Part II of This Brief.

The Nature of the Proceedings in the Trial Court.

No witnesses were sworn and no oral testimony was taken. The pretrial proceedings were stipulated to be considered a part of the trial. The record of the trial, therefore, starts with the pretrial conference.

On April 1, 1953, the counsel for the parties met with Judge Tolin for a pretrial conference. The uneven temper of the conference is obvious from the Reporter's Transcript [R. 69, 70, 74, 76, 77, 79, 80, 88, 89, 107, 109, 110, 112]. The Judge commented a number of times on the difficulty between counsel, saying at one point that he thought that it would be better for their "respective healths" if they would "avoid taking umbrage with one another." [R. 80.] And Mr. Green, counsel for plaintiff (Appellee), said to Mr. McCall, counsel for defendants (Appellants), "I don't seem to be able to agree with you even as to the time of day." [R. 107].

In this atmosphere, an attempt was made to obtain an agreed statement of facts. Counsel for plaintiff (Appellee) undertook to orally state the facts, with constant interruptions. At first, counsel for defendants undertook to object to the conclusions in the oral statement, but there seemed to be some indication that this was not necessary [R. 78]. When the statement was finished, little progress seemed to have been made because the oral statement contained conclusions and defendants' counsel adhered to his original position that the statement which had been read from plaintiff's brief theretofore filed, was accurate when shorn of conclusions [R. 96, 97].

Defendants' statement of facts was not read into the record but simply incorporated by reference to their brief theretofore filed with some oral changes accepted by Mr. McCall to accommodate Mr. Green [R. 98, 103]. Realizing the confusion of the conference, Mr. McCall suggested that a transcript be prepared by the reporter and that the attorneys then attempt to agree to a statement of facts in writing [R. 109, 110]. The court replied to this as follows:

"The Court: Actually, this is not a particularly long transcript, and having noted how you get on each other's nerves it seems to be a mutual attribute here, and I don't want to get you into further fights. If you wish to do that, it is agreeable to me; but unless you mutually request it, I would suggest that you let me wade through the transcript. It will not be such a difficult task. This has been a relatively short proceeding."

Sixteen exhibits were marked for identification at the pretrial conference. Almost all were objected to upon the grounds that their genuineness could not be confirmed at that time and that they were irrelevant and immaterial. When it seemed that the "discussion" of the facts and exhibits had concluded, the court commented:

"The Court: We have a record here. It is not, perhaps an Emily Post record, but it is a good legal record." [R. 110.]

A trial date was selected and time allowed for briefs.

The month elapsing between the pretrial and the trial did nothing to improve the atmosphere. Additional exhibits were offered and introduced into evidence. Then the court admitted all of the exhibits which were offered for identification at the pretrial and promptly set aside

the ruling to permit objection [R. 116]. Although the court had read the prime contract before it was introduced into evidence [R. 114] and all of the other exhibits for identification [R. 116], the court reserved a ruling on the objections:

“The Court: I will reserve ruling until we have heard the case and have heard your objections.”
[R. 117.]

Plaintiff amended the complaint, increasing the demand to take advantage of an obvious and inadvertent error as fully explained at pages 12 and 13 of Appellants’ Opening Brief. This was not corrected until just before the current appeal was filed.

The case was submitted by both parties [R. 117 and 118] with the understanding that the record of the pre-trial is also a part of the record of the trial [R. 119]. There was still no ruling on admission of the exhibits marked for identification. The grounds of objection were understood to be that these exhibits were not relevant or material [R. 119]. In fact, a letter had apparently been prepared and given to the Judge specifying which exhibits were objected to and the grounds of objection [R. 122].

At this point, the court being urged to rule upon the admissibility of the exhibits which he had just stated that he had read, said:

“The Court: Mr. Green, you have gone over the exhibits. I feel that I should do that in order to ground my familiarity for the purpose of ruling.

Mr. Green: Yes, your Honor.

The Court: It is still, perhaps, going to be difficult to rule with proper finality on the relevancy of a document until we have the argument.

I would like, however, for counsel to indicate at this hearing which of the exhibits he objects to on the ground of relevancy and I will give that matter special study.

Then when I get to a decision on the case I will say in the memorandum that exhibit so-and-so is admitted and exhibit so-and-so is rejected.

So that you will have a record upon what I base my findings, but the nature of these exhibits is such that the question of relevancy rather than of weight to be given to these documents is what is to be considered.

There are some things that are somewhat on the edge of relevancy in law and others that are right at the spoke of the wheel.

It is going to be difficult for me to give an absolute decision until I have heard your arguments.”
[R. 121.]

Mr. Green wanted to argue the plaintiff's case but the court said that he wanted to get the matter of the exhibits straightened out and asked defendants' counsel if they were prepared to tell the court which exhibits they were objecting to [R. 122]. Mr. McCall referred to the letter covering this subject and the court acknowledged having seen it [R. 122]. Counsel then orally told the court which ones he had no objection to and which ones he objected to [R. 122]. Mr. Green suggested that they be offered again one by one and this proposal was adopted [R. 122].

The following exhibits were offered and admitted: Exhibit 2 [R. 123], Exhibit 3 [R. 123], Exhibit 4 [R. 123], Exhibit 5 [R. 123], (subject to a motion to strike it if such a motion is in the brief to be filed), Exhibit 7

[R. 125], Exhibit 8 [R. 125]. Then Mr. Green offered Exhibit 9, which met with objection. The court had this to say:

“The Court: It is my tentative view that this document is admissible.

However, because there has been an objection and my view is still tentative enough that I am sort of standing on it with one foot instead of both I don’t have too much confidence in my understanding of relevancy.

I will reserve ruling on this until after argument.”
[R. 126-127.]

Exhibit 11 was offered. The court asked Mr. Green how relevant it is and Mr. Green replied that he didn’t know because he didn’t know what the defense was and the Judge commented that he didn’t either and that the defense had rested at which point the following colloquy took place:

“The Court: They have rested their evidence.

Mr. Green: I know, your Honor, that is why we want to put these things in and have them in the record.

The Court: We are sort of backtracking to the plaintiff’s case in order to get a record because of uncertainty as to what the present record is.

Now (*sic*) having any defense presented as to which this would be relevant the objection is sustained as to No. 11 with permission to reoffer if anything is presented which would make it relevant.”
[R. 128.]

The offer of Exhibit 11 was withdrawn.

Exhibit 12 was offered in evidence but nothing was done about it [R. 128]. Exhibits 14, 15 and 16 were admitted [R. 129]. Exhibit 1 was offered and met with objection. The court reserved ruling until argument [R. 130]. Exhibits 12 and 13 were accepted without objection [R. 130]. Actually, Exhibits 16 and 17 had already been received in evidence [R. 115-116].

The court had reserved a ruling on Exhibits 1 and 9. Exhibit 10 had never been offered in evidence, and never was, while No. 11 had been withdrawn.

At the request of the court, counsel for defendants, Appellants here, briefly outlined the defense [R. 131, 133]. Mr. Green then argued his case for the plaintiff, during which he made reference to cases cited in briefs already on file. The court commented:

“The Court: I have read the exhibits but have deferred reading the briefs until I have heard the argument.” [R. 137.]

The court set a time for filing briefs, commenting:

“I will give both sides time to file a brief, but it is not required because the principles in this case are rather simple and if no one files any briefs and my law clerk and I can go into the library, we can work it off in a couple of hours. If you can save us that couple of hours with briefs that are complete enough with quotations, you may be sure I will read all of them.” [R. 145.]

The case stood submitted on May 25 and the decision was recorded in a minute order dated May 27, 1953 [R. 34]. While a transcript of the proceedings at the trial was prepared, the certificate of the reporter indicates that this was not available until June 19, which was not

only after the date of decision, but after the findings, conclusions and judgment had been signed and filed, which was June 9, 1953. So the court did not have a transcript of the May 8, 1953 proceedings before it at the time of decision.

As has been indicated, it was contemplated that rather than have opposing counsel attempt to agree upon a statement of the facts, the court would review the transcript. It was further anticipated that the court would prepare a memorandum which would among other things indicate the ruling upon the exhibits where reserved. The court did not prepare a memorandum or rule upon the admissibility of exhibits.

A motion for a new trial was filed on June 19, 1953 [R. 43-55] and duly noticed [R. 55-56]. This motion specifically called attention to and was in part based upon the fact that the court had not ruled upon the admissibility of Exhibits 1, 9 and 10 (although 10 was never offered) [R. 54]. This motion was twice continued on the court's own motion and was argued October 19, 1953 to stand submitted October 26, 1953 [R. 58]. It was denied December 31, 1953 by minute order to that effect [R. 59].

Both defendants gave notice of appeal [R. 59]. After the appeal was docketed as number 14305-T, Appellants moved the Court of Appeals to clarify the Record on Appeal by striking those exhibits which were not admitted into evidence in the District Court, to wit: Exhibits 1, 9, 10 and 11. At the time of the hearing on this motion, Mr. Green presented an order signed by Judge Tolin as the trial judge with an addition in his own handwriting [Sup. R. 3-4]. This had been obtained *ex parte* without any notice to counsel for Appellants, although counsel for

Appellants was in the same building in the courtroom of the Court of Appeals while Mr. Green was obtaining the order on the third floor in Judge Tolin's chambers [Sup. R. 60]. The handwritten addition reads as follows:

“This order signed this 5th day of April, 1954, *nunc pro tunc* June 1, 1953, for the reason that by inadvertence the Exhibits were not received into evidence. The Court mis-remembered the events at trial and failed to rule as it intended to do, that the Exhibits be received.

/s/ ERNEST A. TOLIN,
Judge.”

It should be observed that the order purports to admit the exhibits *nunc pro tunc* as of June 1, 1953, which is a time subsequent to the court's decision. (Parenthetically, it should be here noted that these events are not recited as a foundation to a challenge of consideration of such exhibits in arriving at a decision in this appeal. Appellants stipulated in the Court of Appeals that they might be considered a part of the record on appeal.)

The Court of Appeals held that the appeal was premature. When the mandate was issued, on September 30, 1955, Appellants (Defendants below) filed and duly noticed a Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Therefor and Notice of Motion [Sup. R. 4-8]. The hearing of said motion was continued at the request of counsel from October 14 to October 31, 1955 [Sup. R. 8]. Meanwhile counsel for plaintiff filed Notice of Motion to Amend Judgment *Nunc Pro Tunc*, Statement of Reasons in Support Thereof [Sup. R. 9-12].

Before court on the date of the hearing, October 31, 1955, counsel for plaintiff and counsel for defendant Farmers and Merchants Bank of Long Beach saw Judge Tolin in chambers without notice to counsel for Appellants and presented a Stipulation and Order for Dismissal of the Bank. Judge Tolin signed the order [Sup. R. 18].

Counsel for Appellants expressed the fear that the objective of the dismissal was to render the judgment final as of the date the judgment was entered and thus deprive the parties of their right to appeal [Sup. R. 54]. This seemed to be in accord with Mr. Green's view [Sup. R. 55, 56]. A continuance was requested until the law could be looked into. Mr. Green then requested that the continuance go over to January. It was then pointed out to the court that the same result would obtain from a continuance of 60 days unless the judgment were first set aside [Sup. R. 55]. The court suggested that the same result could be obtained by setting aside the dismissal [Sup. R. 57], but followed the suggestion with this comment:

"The Court: I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind." [Sup. R. 57.]

Hearing on the motions was continued to January 16, 1956, and a minute order was made that the dismissal should not be filed [Sup. R. 13-14].

On January 16, 1956, the motions came on for argument. The court did not realize that the matters were on the calendar [Sup. R. 61]. Before Appellants' counsel

had completed his argument and still had other points to make, the court interrupted to say that he was inclined to grant the motion [Sup. R. 68] and later explained his reasons as being that the court left the bench confused at the end of the trial, didn't understand why the case was being defended and would now like to hear the whole case properly presented by both sides instead of only one [Sup. R. 77].

Mr. Green argued that the burden of obtaining a final order which could be appealed was the duty of the Appellants who had lost the case [Sup. R. 69, 70, 72 and 79]. He argued that the court could correct its order *nunc pro tunc* as requested by plaintiff to make it final or enter the dismissal for the same purpose, but that it lost jurisdiction to vacate it because of the passage of time [Sup. R. 76, 81]. Appellants' counsel pointed out that the judgment itself was erroneous in two respects, one conceded and one not [Sup. R. 83]. Appellee then argued that because an error in the judgment had been conceded in briefs in the appeal which had been dismissed, the error had been corrected in the judgment [Sup. R. 84]. All motions were ordered submitted [Sup. R. 86].

On March 23, 1956, the court directed the clerk to enter the order dismissing the Farmers and Merchants Bank of Long Beach and the clerk did so on that day [Sup. R. 18]. No notice of this action was ever sent to the parties.

On March 30, 1956, the court signed the Order *Ex Parte Nunc Pro Tunc* which was designed to conform the Judgment to Rule 54(b) and it was filed and docketed and entered on the same day [Sup. R. 18-19]. Notice of this action was mailed by the clerk and this notice was designated as a part of the record on appeal, item 65

[Sup. R. 43] and in Appellants' designation of the record which is material to the appeal as item 10 thereof [Sup. R. 98]. The same was not otherwise printed in the record, possibly because it consisted of a postcard notice to counsel only. Suffice it to say that this notice was the cause of inquiry as to the disposition of the original motion filed by Appellants. This was never ruled upon.

Assuming that entry of the dismissal of the Bank rendered the judgment final at that time, the time within which a motion for a new trial could be made had already expired when the clerk's notice was sent out. To obtain relief from the judgment which was concededly defective in amount, and relief from a judgment on the ground that the court admittedly had not understood the case, Appellants filed a motion under F. R. C. P. 60 [Sup. R. 19-25], obtained an order shortening time and gave the required notice [Sup. R. 19-25] and obtained a stay of execution [Sup. R. 25-26].

Relief demanded by the moving party was granted in part pursuant to stipulation as follows: (1) the *nunc pro tunc* order of March 30, 1956 [Sup. R. 18-19] was recalled and set aside; (2) Judgment itself was recalled; (3) a new and corrected judgment was ordered entered correcting the conceded errors in amount. The balance of the relief requested was denied [Sup. R. 27]. The corrected judgment was entered April 18, 1956 [Sup. R. 28-29] from which Appellants have appealed [Sup. R. 30].

No. 15164.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

Appellee's Supplemental Answering Brief.

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TOPICAL INDEX

PAGE

I.

Statement of the pleadings and facts disclosing jurisdiction (Appellee's Original Answering Brief, pp. 1-2).....	2
--	---

II.

The nature of the proceedings in the trial court.....	3
---	---

III.

Concise statement of facts (Appellee's Original Answering Brief, pp. 2-4).....	7
--	---

IV.

The issues involved.....	8
A. Has the trial court abused its discretion in denying appellants' motion under Federal Rules of Civil Procedure 60(b)?	8
B. Is Grandy contractually liable to appellee?.....	8
C. Has Glens Falls obligated itself to appellee under the common law performance and payment bonds?.....	8

V.

The evidence in support of the trial court's findings and judgment?	8
A. There is substantial evidence to support the findings and judgment regarding Grandy's contractual liability to appellee	8
B. The performance and payment bonds are the best evidence of the contractual liability of Glens Falls to appellee	10

VI.

Argument (Appellee's Original Answering Brief, pp. 5-27).....	11
A. The trial court has not abused its discretion in denying appellants' motion under Federal Rules of Civil Pro- cedure 60(b)	11
B. Under the Facts and the Law Grandy is contractually liable to appellee.....	15
C. Appellant Glens Falls has obligated itself to appellee under the common law performance and payment bonds..	16

VII.

Conclusion	24
------------------	----

TABLE OF AUTHORITIES CITED

CASE	PAGE
Daniel-Morris Co. v. Glens Falls Indemnity Co., 308 N. Y. 469, 126 N. E. 2d 753.....	17, 23
Klapprott v. United States, 335 U. S. 601.....	12, 13, 14
McGrath v. American Surety Company, 307 N. Y. 552, 122 N. E. 2d 906.....	16, 17, 20, 22, 23
Pacific States Co. v. U. S. Fidelity & G. Co., 109 Cal. App. 691, 293 Pac. 812.....	20, 21, 22
Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F. 2d 645	17, 20, 21, 22, 23

RULES

Federal Rules of Civil Procedure, Rule 1.....	14
Federal Rules of Civil Procedure, Rule 54(b).....	1
Federal Rules of Civil Procedure, Rule 60(b).....	8, 12, 14
Federal Rules of Civil Procedure, Rule 60(b)(1).....	11, 12
Federal Rules of Civil Procedure, Rule 60(b)(6).....	12

STATUTES

Civil Code, Sec. 1589.....	15
Civil Code, Sec. 3521.....	15

TEXTBOOKS

4 Corbin on Contracts, Sec. 798, 1956 Pocket Part, p. 23.....	22
4 Corbin on Contracts, Sec. 799, p. 168.....	21
4 Corbin on Contracts, Sec. 799, 1956 Pocket Part, p. 26.....	23
4 Corbin on Contracts, Sec. 799, 1956 Pocket Part, p. 27.....	21

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vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

Appellee's Supplemental Answering Brief.

This case was before this Court on a previous appeal (under No. 14,258) in which a transcript of record and the following briefs were filed: Appellants' Opening Brief, Appellee's Answering Brief and Appellants' Reply Brief. The case was argued and submitted. The appeal was dismissed as premature because the trial court's judgment did not dispose of the whole case nor conform to Federal Rules of Civil Procedure, section 54(b); see 225 F. 2d 838. After the mandate of this Court was filed below, the trial court, on stipulation of the parties concerned, ordered the dismissal of a defendant concerning whom the judgment heretofore appealed from was silent. [Sup. R. 17-18.]

This case is before this Court again on the prior record plus the record of the proceedings had subsequent to the dismissal of the original appeal. Pursuant to stipulation and with the consent of this Court, the prior Transcript of Record, referred to herein as "R.", and the briefs heretofore filed will again be used. A Supplemental Transcript of Record, referred to herein as "Sup. R.", has been prepared and filed, and the original briefs are to be supplemented.

For convenience appellant Glens Falls Indemnity Company will be referred to as "Glens Falls" and appellant E. F. Grandy, Inc. will be referred to as "Grandy"; together they will be referred to as "appellants."

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

The statement in Appellee's Original Answering Brief, on pages 1 and 2 thereof, is complete except for the dismissal of The Farmers and Merchants Bank of Long Beach, which is no longer a party to this action. Appellants have stated that they appeal from both the judgment from which the original appeal was taken and the judgment entered by the trial court subsequent to this court's dismissal of the original appeal; see page 2 of Appellants' Supplemental Opening Brief.

Appellee confirms that the judgment entered subsequent to the dismissal of the original appeal is correctly stated as to the amount thereof. [Sup. R. 28-29.]

II.

The Nature of the Proceedings in the Trial Court.

Appellants have endeavored to cloak with “confusion” the trial court’s determination of the merits of this action and have carried this cloak of confusion into their appeal. On page 3 of their Supplemental Opening Brief, appellants state: “The proceedings in the trial court were confused from the beginning and continued so to the end.” Faced with an adverse judgment appellants claim that the trial court never understood their side of the case. This approach to an adverse judgment is reminiscent of the unhappy judgment debtor being consoled by his trial attorney that the judge never understood their case, otherwise they would have prevailed.

At one point appellants assert that the record was “confused” and at another point, on page 18 of their Supplemental Opening Brief, appellants ask this court to render a new judgment based on the same record—the same facts and the same law—that was before the trial court. Appellants want to retry this case without new evidence and without new legal authorities. Let us look to the record established in the trial court.

The fundamental issues of appellee’s case are set forth in its complaint filed nearly five years ago on July 2, 1952 [R. 3-9]; to date these issues have not changed. The answers filed by Glens Falls and Grandy on August 6, 1952, and on October 22, 1952, respectively, raised the same defensive issues that were before the trial court and that are now before this court. [R. 9-10, 14-16.]

Well in advance of the first pre-trial hearing the following documents developing the facts and law of the case were exchanged between appellee and appellants and

were filed with the trial court: (1) appellee's interrogatories and appellants' answers [R. 11-14, 17-23]; (2) appellee's request for admissions and Grandy's admissions [R. 26-28]; (3) appellee's Memorandum Brief; and (4) appellants' Pre-Trial Brief.

By stipulation of the parties no witnesses were sworn nor were depositions taken. The facts of the case were either agreed upon or presented at the first pre-trial hearing held on April 1, 1953. In this regard the trial court stated:

"It is understood, pursuant to stipulation, the court will consider the statement of facts with the exception of the deletion I have indicated, which has been made by counsel for the plaintiff, and the statement of facts which has been filed in writing by the defendants and which he has adopted by reference, rather than restatement, as the evidence in the case.

"The court will consider the exhibits which have been introduced today, providing that the genuineness of certain of them which counsel were not prepared to concede is hereafter conceded by letter; and that on the trial of this case we will try the issues of law, *counsel briefing those issues in advance of trial and appearing for such argument as they feel is indicated, and for such questions as the court might direct to them at that time.*" [R. 107-108.] (Italics ours.)

As to the time for filing additional briefs before the second court hearing, the trial court stated its order very clearly:

"The court will order that either party may, but need not, file any brief in this matter within 20 days of the receipt of the transcript.

“The reporter will notify the court when the transcript is prepared, and I will have a copy of it.

“Within ten days of the filing of any brief which any party desires to file, the opposition may file the reply brief thereto. That will give us about 30 days from Monday.

“Then we will set a day for trial, it being my understanding that in all probability after the examination has been made of these documents, all we will have to try is the issues of law and not take evidence.” [R. 111.]

The parties then stipulated and the court ordered that the time for argument would be on the afternoon of May 8, 1953. The certificate of the reporter indicates that the transcript of the April 1, 1953 pre-trial was available on April 6, 1953. Counsel for appellants was given more than a month after the availability of that transcript in which to submit any further briefs. Any further briefs were to be filed in advance of the May 8, 1953 trial, which was set for oral argument. However, for one reason or another, trial counsel for appellants did not prepare and submit additional briefs other than the Pre-Trial Brief submitted prior to the April 1, 1953 pre-trial.

At the May 8, 1953 trial no further evidence was submitted other than appellants' three exhibits and the introduction of appellee's exhibits which were already before the court at the April 1, 1953 pre-trial. Appellants advised the court that they rested on the evidence submitted. [R. 130.] As for oral argument the following discussion took place between trial counsel for appellants and the trial court:

“Mr. McCall: Your Honor, I believe that exhibits we presented to the Court have been introduced and received.

“The plaintiffs put in the contract and the bonds, which is our main defense, and *subject to the brief we will write with the Court’s permission we rest.*

“The Court: That brings us to the time of argument.

“Are you prepared for oral argument today?

“Mr. McCall: *I was willing to waive oral argument if we filed briefs.*

“The Court: *Do you mind relieving me somewhat of judicial suspense?*

“Tell me the defense to this action and write the brief and back it up.” [R. 130-131.] (Italics ours.)

Counsel for appellants then outlined the same defenses that appear in their prior pre-trial brief, in the brief that followed the May 8, 1953 hearing, in the motion for new trial briefed and argued by counsel associated in this appeal, and in the appellate briefs heretofore filed. [R. 131-134.] The trial court then ordered that any further briefs had to be submitted before the close of business on May 20, 1953. [R. 145.] Counsel for appellants filed a further brief a few days after the May 20, 1953 deadline but before judgment for appellee was entered.

After the trial court entered judgment for appellee, appellants’ counsel associated in this appeal briefed and argued a motion for a new trial. [R. 57-58.] Thereafter, the trial court denied the motion for a new trial. [R. 58-59.]

III.

Prior Statement of Facts.

On page 7 of their Supplemental Opening Brief appellants concede that appellee's statement of facts in its Original Answering Brief is accurate except as to two statements. Therefore, only the two statements need be discussed here.

On said page appellants have incorrectly restated, *viz.*, "the specifications required that certain materials be purchased from appellee," the statement appearing on page 3 of appellee's Original Answering Brief:

"In accordance with the specifications of said subcontract, it was necessary for V. L. Murphy to obtain from the American Seating Company, appellee, certain material and equipment which are described as a chemical sink, a chemical table, and a chemical fume hood."

The specifications required the installation of the equipment [R. 156, 161, 163-166], that equipment had to be obtained from a supplier such as appellee, and Grandy knew that the particular supplier was appellee. [Admission No. 3 at R. 27; Exs. 8, 11.] Glens Falls knew or should have known that the subcontract specifications required the equipment in question and that such was to be obtained from a supplier such as appellee. [Exs. 3, 4.]

Appellee made the following statement on page 3 of its Original Answering Brief:

"The general contractor, Grandy, forwarded the purchase order to the American Seating Company and knew that this material at the agreed price was

to be installed by American Seating Company into the project which Grandy contracted to construct for the United States Government.” (Italics ours.)

Appellants in the statement of facts in their Supplemental Opening Brief do not contest the accuracy of the italicized part of the sentence. For clarity the first part of the sentence should read: “The general contractor, Grandy, forwarded to the naval officer in charge the purchase order awarded to the American Seating Company.”

IV.

The Issues Involved.

The essential issues involved in this appeal are:

A. Has the trial court abused its discretion in denying appellants’ motion under Federal Rules of Civil Procedure, Section 60(b)?

B. Is Grandy contractually liable to appellee?

C. Has Glens Falls obligated itself to appellee under the common law performance and payment bonds?

V.

The Evidence in Support of the Trial Court’s Findings and Judgment.

Appellee does not undertake to present herein all of the evidence in the case which substantiates the findings and judgment by the trial court.

A. There Is Substantial Evidence to Support the Findings and Judgment Regarding Grandy’s Contractual Liability to Appellee.

Appellee’s quotation for the materials it furnished for installation under the government contract was sent

to Grandy and stamped "received" by Grandy. [R. 79; Ex. 5.] The purchase order awarded to appellee was stamped "received" by Grandy. [R. 82; Ex. 7.] Copies of the purchase order were transmitted by Grandy to the Navy. [R. 163; Ex. 8.] Correspondence was sent to Grandy by appellee concerning completion of the work. [R. 164; Ex. 9.] The correspondence was forwarded by Grandy to the Navy. [R. 165; Ex. 10.] A letter dated January 6, 1950, was sent by Grandy to appellee regarding non-compliance with specification requirements. That letter [Ex. 11] includes a request by Grandy for completion of appellee's work so that funds could be received:

"You are, no doubt, aware that the above mentioned noncompliance constitutes a very effective block to receipt of funds for work already performed on the contract at Seal Beach.

"In view of this condition, it is requested that your firm make all possible effort to comply with the required work outlined in the enclosed letter." [R. 166.]

From the evidence it has been established that Grandy knew the source of the materials needed for completion of the prime contract, had requested that the work by appellee be completed so that funds could be received, and yet Grandy, after suggesting to the subcontractor that the subcontract be assigned to a bank [Ex. 1], without notice to appellee, continued to make payments to the assignee bank. There was no evidence introduced by Grandy that it ever demanded a statement from the assignee bank or from the subcontractor that appellee had been paid for the required materials. In addition, Grandy should have been aware of its obligations to appellee, for Article 6(d) of the

contract between Grandy and the Government [Ex. B] provides on page 4 of said contract:

“The obligation of the Government to make any of the payments required under any of the provisions of this contract (including those of Articles 25 and 26) shall, in the discretion of the Contracting Officer, be subject to (1) any unsettled claims against the Contractor for labor and materials. . . .”

The trial court was justified in inferring from the evidence that an implied-in-fact contract existed between Grandy and appellee. Even in the absence of an implied-in-fact contract, the trial court could properly hold that there was an implied-in-law obligation for the payment by Grandy to appellee for the materials furnished by appellee.

B. The Performance and Payment Bonds Are the Best Evidence of the Contractual Liability of Glens Falls to Appellee.

At the April 1, 1953 pre-trial, counsel for Glens Falls recognized that the “bonds speak for themselves” [R. 72-73]; nevertheless, in Appellants’ Supplemental Opening Brief there are conjectures as to the intent of the parties, substantiated only by self-serving conclusions that the parties “intended” for the bonds to protect Grandy only; see page 42 of Appellants’ Original Opening Brief.

The bonds are before this court as Exhibits 3 and 4.

VI.

Argument.

A. The Trial Court Has Not Abused Its Discretion in Denying Appellants' Motion Under Federal Rules of Civil Procedure, Section 60(b).

This issue is raised by appellants in Point 7 of their argument and represents their latest effort to conceal the basic inadequacies of their case. Appellants virtually devote their Supplemental Opening Brief to this issue alone and the fundamental questions going to the merits of the case are submerged. Although we must address ourselves to this issue raised by appellants, we urge this court to note particularly our subsequent arguments under this section which pertain to the fundamentals of this action.

After reading Section II of this brief it should be apparent to this court that the issues of this case have been clear from the start, that appellants were given more than ample opportunity to present the facts and law of their case to the trial court, that the same facts and law upon which appellants urge this court to render a new judgment were considered by the trial court, and that the trial court founded its judgment upon the basic merits of appellee's case and upon the basic inadequacies of appellants' case.

Appellants cite Rule 60(b)(1) as a basis for relief from the adverse judgment. Unable to show "mistake, inadvertence, surprise or excusable neglect" appellants argue that Rule 60(b)(1) may be applicable to mistakes of law and cite *Moore's Federal Practice* for that proposition. Even the passages quoted from the cited text require that "error of law apparent" must be first established, assuming that that rule covers such errors. After

many opportunities appellants were unable to satisfy the trial court that there was any "error of law apparent," and it was within the proper discretion of the court to rule against the Rule 60(b) motion if based on that ground.

However, appellants concede that they are not really relying on clause (1) of Rule 60(b), by the manner in which they phrased their question 7 on appeal and by stating on page 14 of their Supplemental Opening Brief that "there is another clause which is most applicable to the unusual situation presented by the instant case." Appellants base their Supplemental Opening Brief on the "other reason clause," clause (6) of Rule 60(b).

The only direct authority which appellants cite, when asking this court to reverse the trial court's denial of the Rule 60(b)(6) motion, is the case of *Klapprott v. United States*, 335 U. S. 601 (1949). In that case by a close 5-4 decision, with vigorous dissents, the Supreme Court vacated a *default* judgment from the District Court which had cancelled citizenship by naturalization. The opinion of the Court carefully detailed the facts justifying relief from the default judgment: (1) the petitioner had no hearing in the trial court and thus no opportunity to present his defense, (2) he had no counsel for the action, and (3) he was in jail at the time of the entry of the default judgment without funds, and (4) the United States did not introduce any corroborating evidence.

Speaking for the Chief Justice, for Justice Jackson and for himself, Justice Reed, in a dissenting opinion, stated at 335 U. S. 627:

"The limitations imposed by Rule 60(b) are expressions of the policy of finally concluding litigation within a reasonable time. *Such termination of*

lawsuits is essential to the efficient administration of justice. I would not frustrate the policy by allowing litigants to upset judgments of long standing on allegations such as Klapprott's." (Italics ours.)

Four of the Supreme Court Justices would not apply the "other reason" clause to the facts of the *Klapprott* case. *A fortiori* the "other reason" clause should not be applicable here.

Appellants at page 15 of their Supplemental Opening Brief take from the opinion of the Court in the *Klapprott* case the bare proposition that a judgment may be vacated "whenever such action is appropriate to accomplish justice." While trying to point out "irregularities" and "confusion" in the proceedings below, appellants specify no prejudicial errors that precluded fair, impartial hearings or that interfered with the right to be heard.

As Justice Reed cautioned in his dissenting opinion in the *Klapprott* case, 335 U. S. 620-627, justice requires that there be an end to litigation. This fundamental axiom in the judicial administration of justice was well stated by the trial court in this case:

"The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.

"Parties who come into the court must get their cases properly presented at the trial, and there must be a finality to decisions, *having once found—and I see no reason to think I was wrong—that there was liability here.* Although there was an error in the computation, that has now been corrected by stipulation.

“I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, that you would try it.

“But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.

“So I deny the present motion.” [Sup. R. 93.]
(Italics ours.)

The views of the trial court in this case and of Justice Reed in his dissent in the *Klapprott* case conform to Rule 1 of the Federal Rules of Civil Procedure, which designates the scope and interpretation of the Rules:

“These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.”

Rule 60(b) must be so construed.

Appellee filed its complaint nearly five years ago to recover payment for materials furnished more than six years ago. Appellants have been given a fair and complete hearing. The judgment is affirmable because it is supported by the law and facts of this case. The trial court properly exercised its discretion in denying the motion under Rule 60(b).

B. Under the Facts and the Law, Grandy Is Contractually Liable to Appellee.

The evidence, discussed in Section V A. of this brief, and the inferences which may be drawn from such evidence, substantiate Grandy's contractual liability to appellee. In particular, Exhibit No. 11 is the basis for an implied-in-fact contract whereby Grandy requested and received materials required before the government would pay under the prime contract. Grandy implied that appellee would receive its share of the funds. Moreover, under the prime contract, particularly paragraph 6(d) thereof, Grandy should have protected appellee's share of the funds. Nevertheless, Grandy, after obtaining performance from appellee, continued to make payment to the assignee bank. No inquiry was made by Grandy as to whether appellee was being paid by the assignee bank or by the subcontractor. Now Grandy joins Glens Falls in denying any rights to appellee for recovering under the subcontractor's bonds.

The facts of this case require the application of *section 1589 of the Civil Code of California*, which provides:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The facts here are stronger than those required by the Code, for here Grandy requested and received the benefit of appellee's performance.

Also applicable is the equitable doctrine set forth in *section 3521 of the Civil Code of California*:

"He who takes the benefit must bear the burden."

C. Appellant Glens Falls Has Obligated Itself to Appellee Under the Common Law Performance and Payment Bonds.

This supplements the argument appearing in Appellee's Original Answering Brief, particularly pages 16 through 19 thereof.

Glens Falls argues as follows:

1. That under the common law performance and payment bonds there was no intention to protect materialmen, such as appellee, who are strangers to the bonds, for such strangers were to be protected by the Miller Act;
2. That there was no intention for the performance bond to insure payments for materials;
3. That there was no intention for the payment bond to insure payments to materialmen.

These arguments are answered in a recent line of cases, which are supported by the California cases previously cited in Appellee's Original Answering Brief.

In *McGrath v. American Surety Company*, 307 N. Y. 552, 122 N. E. 2d 906 (1954), the plaintiff performed work for a plumbing subcontractor to a general contractor under a prime contract with the federal government. The general contractor posted Miller Act performance and payment bonds. The action was brought against the surety for the plumbing subcontractor; no action was commenced under the Miller Act. Defendant surety moved to dismiss the action, and the trial court and the intermediate appellate court denied the motions for dismissal. The New York Court of Appeals reversed the two lower courts and held that the rights of laborers and materialmen were fixed and protected by the Miller Act; there was no cause of action against the subcontractor's surety

because the parties only intended for the bond to protect the general contractor against Miller Act liability.

The decision in the *McGrath* case has been criticized in the *Socony-Vacuum* case, *infra*, has been criticized by Professor Corbin in his treatise on Contracts, cited *infra*, and has been “distinguished” in the *Daniel-Morris* case, *infra*, which was decided in the same jurisdiction as the *McGrath* case.

In *Socony-Vacuum Oil Co. v. Continental Casualty Co.*, 219 F. 2d 645 (C. A. 2d 1955), plaintiff was a supplier to a subcontractor performing work under a prime contract for construction of a radar station for the federal government. Defendant was surety under a common law bond naming the prime contractor as obligee and the subcontractor as principal. The action was not brought on the prime contractor’s Miller Act bonds; the plaintiff had failed to perfect his rights against the surety on the prime contractor’s payment bond within the time limitations of the Miller Act. Defendant surety moved in the trial court for a dismissal of the action on the ground that plaintiff had no rights in the bond because the bond was for the protection of the prime contractor only. The trial court dismissed the action; the Court of Appeals for the Second Circuit reversed and held that the material-man had a right of recovery on the bond.

The common law bond in the above case provided:

“Whereas, the above bounden Principal has entered into a certain written contract with the above named Obligee, dated the 8th day of May, 1950, for the construction of Roads, Parking Areas, etc. at St. Albans, Vermont.

“Which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

“Now, Therefore, The Condition of the Above Obligation Is Such, That if the above bounden Principal shall pay all labor and material obligations and shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified and shall pay over, make good and reimburse to the above named Obligee, all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect.”

The Second Circuit held that under the above bond there was a promise to pay labor and material obligations and stated at 219 F. 2d 647:

“Professor Corbin in his work on the law of contracts, 4 Corbin on Contracts, Sections 798-804, had this to say: ‘* * * the third party has an enforceable right if the surety promises in the bond, either in express words, *or by reasonable implication*, to pay money to him. If there is such a promissory expression as this, there need be no discussion of ‘intention to benefit.’ We need not speculate for whose benefit the contract was made, or wonder whether the promisee was buying the promise for his own selfish interest or for philanthropic purposes. It is a much simpler question: Did the surety promise to pay money to the plaintiff? . . . This doctrine, we think, has the support of the great weight of authority.’” (Italics ours.)

The court instructed the trial court to not speculate as to the intent or motives of the parties to the bond, for the language or the reasonable implication of the

language controls. Appellants here have already speculated extensively as to the reasons for their conclusion that it was the intention of the parties to protect Grandy only. In that regard, the Second Circuit further stated at 219 F. 2d 648:

“We are unable to recognize either the validity or the relevance of the conclusion of the trial judge that the bond was given only for the benefit of the prime contractor and not for the protection of materialmen. Doubtless the prime contractor in requiring a bond of its subcontractor sought protection against his own liability to materialmen of the subcontractor. But this he obtained through a bond requiring payment of the materialmen. Obviously it was contemplated that performance under the bond would benefit not only the prime contractor who would thereby be exonerated from liability to the materialmen thus paid but also the materialmen of the subcontractor who were thereby to be paid.”

As to the failure of the materialman to bring a timely suit against the prime contractor and its surety under the Miller Act, the Court stated at 219 F. 2d 648:

“The situation is affected not at all by the fact that the plaintiff failed to perfect its rights under the Miller Act against the prime contractor and its surety. The bond now sought to reach was not one required under that Act and the rights to which it gave rise are not qualified by the Act or conditioned upon the timely pursuit of remedies under that Act. The rights under this bond must be determined by its language interpreted as of the date it was given. At that time, of course, it was not known whether all or some of the materialmen would fail or decline to press their rights under the Miller Act.”

Appellants here have argued that the clearly stated obligations of Glens Falls under the performance bond, which the leading case of *Pacific States Co. v. U. S. Fidelity & G. Co.*, 109 Cal. 691, 293 Pac. 812 (1930), construes as including a promise to pay materialmen, are of no legal consequence in light of a supposed intent of the parties to separate performance and payment into two bonds. As to this point, the criticism by the Second Circuit in the *Socony-Vacuum* case, at 219 F. 2d 649, regarding the *McGrath* case, should be considered:

“We do not blink the fact that the *McGrath* case, as far as appears from the facts stated in the opinion, is legally indistinguishable from that now before us. True, in *McGrath* the subcontractor furnished both a payment bond and a performance bond whereas here a single bond is involved which is conditioned both for payment of ‘material obligations’ and for performance of the subcontract. *But this, we think, is a difference without legal significance.* Both the *Spokane* and the *McGrath* cases and others of similar purport we think out of line with the great weight of authority referred to above. *With deference, we suggest that it is unfortunate doctrine to modify the scope of a plainly stated written obligation in a private bond by the supposed motive of the obligee, as these cases seem to do.* Such doctrine leads to unnecessary and undesirable uncertainty in business relationships. It means that one within the orbit of a private bond cannot rely upon a plainly stated obligation, instead he must search for the undisclosed motive of the parties and take that as the measure of his rights.” (Italics ours.)

At the trial of the instant case counsel for Glens Falls recognize that “the bonds speak for themselves” [R. 72,

73], yet in the appellate briefs counsel for Glens Falls talk about the "intent" of the parties, perhaps fearful that the bonds speak too clearly for themselves.

The performance bond in this case includes a promise to pay materialmen, as stated in the *Pacific States* case, *supra*, which is a leading California decision. In accord with the holding in the *Pacific States* case, Professor Corbin, on page 27 of the 1956 Pocket Part to 4 *Corbin on Contracts*, section 799, states:

"When a subcontractor promises the general contractor to furnish all necessary labor and material, he impliedly promises that such labor and material will be paid for. Also when the subcontractor gives a surety bond conditioned on full performance of his contract, the surety also promises that the labor and materials will be furnished and paid for."

And in 4 *Corbin on Contracts*, section 799, page 168, there is the following statement:

"A surety bond that is conditioned on full performance of his contract by the principal, will operate in favor of such third parties as the principal, by his contract with the promisee, undertakes to pay; the bond need be no more specific."

In the *Socony-Vacuum* case the Second Circuit concludes its opinion at 219 F. 2d 649 with the following statement:

". . . It follows that the surety should not be allowed to avoid the obligation which it was paid to assume by suggesting that as things turned out the obligee did not need all the protection which was bargained and paid for. Were we to hold otherwise, we should in effect, by substituting a mere contract

for indemnity for the bond which was made, be presenting the defendant surety company with an unearned windfall.”

The bond in the *Socony-Vacuum* case contains a promise that “the principal (subcontractor) shall pay all labor and material obligations” and a promise to reimburse the obligee for “all loss and damage which said obligee may sustain by reason of failure” of the subcontractor to make such payments. Here the performance bond provides that “the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract.” The California Supreme Court in the case of *Pacific States Co. v. U. S. Fidelity & G. Co.*, 109 Cal. 691, 293 Pac. 812 (1930), construed the performance bond as including a promise to pay materialmen. Professor Corbin, as cited above and as cited by the Second Circuit in the *Socony-Vacuum* case, agrees with the view of the California Supreme Court that the language of the performance bond by reasonable implication includes a promise to pay materialmen.

The payment bond in this case contains language similar to language in the bond in the *Socony-Vacuum* case, to-wit:

“ . . . and hold the said obligee free and harmless from and against all loss and damage *by reason of its failure to promptly pay all persons supplying labor and materials* used in the prosecution of the work provided for in said subcontract . . . ” (Italics ours.)

Professor Corbin on page 23 of the 1956 Pocket Part to 4 *Corbin on Contracts* section 798 criticizes the *McGrath* case and states that it “is a case that would be

decided differently in other courts,” and on page 26 of that Pocket Part he approves of the *Socony-Vacuum* case. Also on page 26 of the same Pocket Part, Professor Corbin notes that the case of *Daniel-Morris Co. v. Glens Falls Indemnity Company*, 308 N. Y. 464, 126 N. E. 2d 750 (1955), in holding the surety liable to a materialman under a payment bond, made a “futile attempt to distinguish” the *McGrath* case. The *Daniel-Morris* case came from the same court that handed down the much criticized *McGrath* decision. While striving to distinguish the *McGrath* decision, the New York court, clinging somewhat to the “intent to benefit” doctrine, at least made a step forward when it noted the difference between “motivation” and “intent to benefit,” by stating at page 753 of the National Reporter citation:

“The intention to benefit the materialmen must not be confused with the motive of the parties in entering into the bond. Big-W’s (the general contractor) demand for indemnification, as pointed out in the opinion below, ‘supplies the motive in securing the undertaking rather than the intent as to who shall be benefited.’ Once the right is created the law furnishes a remedy irrespective of the motivation of the parties.”

The language of the performance bond in this case includes a promise to pay materialmen. Appellants urge this court to disregard the plain provisions of the performance bond and ask this court to conjecture as to the intent of parties to the bond. Appellants state that the performance bond does not include payment, because the parties “intended” for the payment bond to cover payments for materials; appellants then state that it was their

“intent” for the payment bond merely to indemnify Grandy, so in effect there is no bond coverage for appellee. This court should not tolerate such legerdemain, just as the trial court did not tolerate it.

VII.

Conclusion.

The liability of Grandy and of Glens Falls to appellee has been established by the facts and law of this case. Appellee respectfully submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 15164

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a Corporation, and
E. F. GRANDY, INC.,

Appellants,

vs.

AMERICAN SEATING COMPANY, a Corporation,

Appellee.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF.

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TOPICAL INDEX

PAGE

I.

Appellee has conceded that two statements of fact heretofore made in its briefs are erroneous and unsupported by the record. (This relates to Part III, pages 7-8 of Appellee's Supplemental Answering Brief.)..... 1

II.

There is no evidence that Grandy was contractually liable to appellee American Seating. (This is responsive to Part V-A, pages 8-10, of Appellee's Supplemental Answering Brief)..... 3

III.

There is no legal foundation for the assertion that Grandy is contractually liable to appellee. (This is responsive to Part VI-B, page 15, of Appellee's Supplemental Answering Brief) 4

IV.

Since the only claim against Grandy is that liability is implied in fact or in law from Grandy's conduct and not from the subcontract or Murphy's bonds, joint liability with the bonding company does not exist and a joint judgment is error..... 7

V.

The California cases are explicit and uniform in holding that where there is a performance bond and a payment bond, persons supplying material to a subcontractor cannot recover on the performance bond. (This supplements the argument in appellant's original Opening Brief, page 36, and is responsive to Point VI-C of Appellee's Supplemental Answering Brief.) 9

VI.

None of the authorities cited by appellee are authority for recovery against the performance bond. (This is responsive to Point VI-C of Appellee's Supplemental Answering Brief.).... 16

ii.

PAGE

- A. Pacific States Co. v. U. S. Fidelity and G. Co. does not construe a performance bond..... 16
- B. The Socony-Vacuum case does not involve the problem of the Pacific States case..... 17
- C. Both the McGrath case and the Daniel-Morris case involved payment bonds. They do not support appellee's attempt to recover on a performance bond..... 18

VII.

The payment bond is not available to appellee..... 20

VIII.

The trial court abused its discretion in denying appellants' motion under Federal Rules of Civil Procedure, Section 60b. (This section is responsive to Section II, pages 3 to 6, inclusive, and Section VI-A, pages 11 to 14, inclusive, of Appellee's Supplemental Answering Brief.)..... 22

Conclusion 23

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bruce, Estate of, 27 Cal. App. 2d 44, 80 P. 2d 82.....	6
Daniel-Morris Co. v. Glens Falls Indemnity Co., 308 N. Y. 464, 126 N. E. 2d 750.....	15, 18, 19
Fruitvale Canning Co. v. Cotton, 115 Cal. App. 2d 622, 252 P. 2d 953	5
Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. 442.....	4, 5
Lamson Co., Inc. v. Jones, 134 Cal. App. 89, 24 P. 2d 845.....	9
Llewellyn Iron Works v. Reed, 123 Cal. App. 607, 11 P. 2d 657	4, 5, 8
Maryland Casualty Co. v. Shafer, 57 Cal. App. 580, 208 Pac. 192	9
McGrath v. American Surety Company of New York, 307 N. Y. 552, 122 N. E. 2d 906.....	18, 19
Neet v. Holmes, 25 Cal. 2d 447, 154 P. 2d 854.....	6
Pacific States Co. v. Fidelity & G. Co., 109 Cal. App. 691, 293 Pac. 812.....	14, 15, 16, 17
People v. Fidelity & Deposit Co. of Maryland, 28 Cal. App. 2d 325, 82 P. 2d 495.....	7
Shuey v. Bunney, 4 Cal. App. 2d 408, 40 P. 2d 859.....	7
Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F. 2d 645.....	11, 12, 15, 16, 17, 19
Summerbell v. Weller, 110 Cal. App. 406, 294 Pac. 414.....	9
Thode v. McAmis, 96 Cal. App. 2d 833, 216 P. 2d 548.....	19, 20, 21
United Airlines, Inc. v. Western Airlines, 132 Cal. App. 2d 308, 282 P. 2d 118.....	11

STATUTES

PAGE

Civil Code, Sec. 1589	5, 6
Civil Code, Sec. 1636.....	11
Civil Code, Sec. 2778(2).....	20
Civil Code, Sec. 2819.....	7
Civil Code, Sec. 3510.....	15
Civil Code, Sec. 3521.....	6

TEXTBOOKS

4 Corbin on Contracts, p. 164.....	12
4 Corbin on Contracts, p. 174	13, 26
4 Corbin on Contracts, Sec. 800.....	12
4 Corbin on Contracts, 1956 Pocket Part, p. 25.....	15

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APPELLANTS' SUPPLEMENTAL REPLY BRIEF.

I.

Appellee Has Conceded That Two Statements of Fact Heretofore Made in Its Briefs Are Erroneous and Unsupported by the Record. (This Relates to Part III, Pages 7-8 of Appellee's Supplemental Answering Brief.)

Appellee now concedes that the record does not support its often-repeated claim that the subcontract specifications required the subcontractor V. L. Murphy to obtain certain material from Appellee. The material referred to is the material which Appellee did supply to the subcontractor and for which Appellee was never paid, although Appellant Grandy paid the full subcontract price, which included the materials. Appellee now wants Appellant Grandy to pay for those materials again.

Appellee now says that the materials in question would have to be purchased from a supplier "such as Appellee." This is true in the sense that just as bricks must be purchased from a brickyard, chemical sinks, tables and fume hoods must be purchased from a manufacturer

thereof. Appellee, American Seating Company was such a manufacturer and it got the business from the sub-contractor.

This leads to the second error which was that Appellant Grandy forwarded the purchase order for the equipment to Appellee American Seating Company. A partial correction of this error has been tendered. Appellee has conceded that Grandy did *not* forward the purchase order to Murphy. They now say that Grandy forwarded the purchase order to the Naval Officer in charge of construction. The truth is that Murphy sent the order to American Seating, with a copy to Grandy [R. 81-82]. Grandy sent copies to the Naval Officer in charge of construction [R. 163]. This true state of the record has heretofore been carefully detailed at page 8 of Appellants' Opening Brief and at pages 1 and 2 of Appellants' Reply Brief.

These erroneous statements were used as a premise which was the foundation for the argument that Grandy was liable to American Seating Company for the purchase price of these materials. This premise is now admittedly false. The importance of this point is that the false premise was carried over into the findings. It must be amply clear that finding of fact 6 [R. 39] is false and unsupported in the part which reads as follows:

"6. That it is true as alleged in Paragraph VI of the Complaint that the defendants, E. F. Grandy, Inc. and Glens Falls Indemnity Company, knew that in order for said V. L. Murphy to carry out his contract, it would be and was necessary for him to purchase and obtain supplies and materials from plaintiff."

Since this error of argument was accepted by the trial court and perpetuated in the findings, it is reasonable to believe that the judgment rests upon this crumbly foundation.

II.

There Is No Evidence That Grandy Was Contractually Liable to Appellee American Seating. (This Is Responsive to Part V-A, Pages 8-10, of Appellee's Supplemental Answering Brief.)

All of the evidence, as it is carefully accumulated at pages 8-9 of Appellee's Supplemental Answering Brief, indicates nothing more than that Grandy knew the source of materials purchased by Murphy because Murphy told him and that Grandy watched the progress of the work on the job and did what he could to expedite it.

No responsibility to American Seating fell upon Grandy because of a suggestion that Murphy might borrow money by hypothecating his subcontract. Nothing appears in the record but the fact that Murphy needed money at this time. Grandy told him how he might get some. Murphy took the suggestion. Grandy was advised by the bank of the hypothecation and honored notice to make future payments to the bank.

Such banking transactions by contractors and subcontractors are so common as to be considered almost customary. That suggesting a common method of financing and honoring a proper notice of assignment of proceeds of a contract should make the person so doing liable to creditors of the assignor, is a contention without precedent or authority. Needless to say, none is cited.

True, there is no evidence that Grandy ever demanded a statement from the assignee bank or from the subcontractor that American Seating had been paid. On the other hand, there is no evidence that American Seating ever advised the contractor, Grandy, that it had not been paid. The interesting connecting link between what has been said before in Appellants' briefs about the contractor's Miller Act bond and also, for that matter, the only application of Article 6(d) of the Prime Contract, now appears.

Article 6(d) authorizes the Government to hold up payments to the contractor if there are “any unsettled claims against the Contractor for labor and materials.” Of course, American Seating made no claim [R. 143]. American Seating sued Murphy and recovered a judgment [R. 31]. The possibility of recovering from Grandy or Murphy’s surety seems to have been an after thought. A timely notice to the contractor would have protected the rights of American Seating under Article 6(d) and the Miller Act. Further discussion of this subject at this point would be out of context because the Appellee’s argument that there is either an implied in fact or in law contract rests upon the parts of the record just previously discussed.

Murphy was an independent contractor. He was related to Grandy only as specified in the subcontract. Grandy had no right to know what Murphy did with the money Grandy paid to him. Grandy was legally a stranger to Murphy’s suppliers and had no obligation to pay them.

Llewellyn Iron Wks. v. Reed (1932), 123 Cal. App. 607, 612, 11 P. 2d 657;

Kruse v. Wilson (1906), 3 Cal. App. 91, 84 Pac. 442.

III.

There Is No Legal Foundation for the Assertion That Grandy Is Contractually Liable to Appellee. (This Is Responsive to Part VI-B, Page 15, of Appellee’s Supplemental Answering Brief.)

The factual misstatements which we had hoped might be laid to rest are still the foundation of Appellee’s argument on page 15 of Appellee’s Supplemental Answering Brief. There it is argued that Grandy *requested* the materials. All of the evidence in the record is contrary to this statement. Murphy requested the materials by purchase order.

The next misstatement is that Grandy *received* the materials. The Government received the materials. There is no evidence in the record to support the proposition that Grandy received the materials in any sense. The record shows only that the materials were delivered to the job by American Seating and installed in the work by Murphy. It is, of course, true that the contract had to be performed according to schedule before the Government would pay on schedule, but to say that Grandy requested or received the material from American Seating is contrary to fact.

The statement that Grandy implied that American Seating would receive a share of the funds which Grandy expected to receive from the Government is utterly without support of evidence or inference.

Appellee's argument that the law will imply a promise by a prime contractor to pay his subcontractor's supplier (on the theory that the prime contractor has received the benefit) has been rejected by the California courts. The law will not imply such a promise.

Llewellyn Iron Wks. v. Reed (1932), 123 Cal. App. 607, 612, 11 P. 2d 657;

Kruse v. Wilson (1906), 3 Cal. App. 91, 84 Pac. 442.

As authority to support its argument, Appellee tenders two code sections. Both of them have been frequently cited in the decisions of Appellate Courts, but no decisions are cited in Appellee's brief for reasons which the slightest research discloses.

Section 1589 of the Civil Code has no application to the case at bar. The reason is succinctly expressed in the case of *Fruitvale Canning Co. v. Cotton* (1953), 115 Cal. App. 2d 622, 626, 252 P. 2d 953, 955, in the following words:

“ . . . This section, however, has generally been held to apply only where the person accepting the

benefit was a party to the original transaction. (*Canale v. Copello*, 137 Cal. 22, 25 (69 P. 698); *Stone v. Owens*, 105 Cal. 292, 296 (38 P. 726); *Tarpey v. Curran*, 67 Cal. App. 575, 587 (228 P. 62); *Beazley v. Embree*, 41 Cal. App. 706 (183 P. 298).) Defendants were not parties to that agreement."

The court flatly held that the defendants in that case were not parties to the original contract and that, therefore, Civil Code Section 1589 had no application.

Section 3521 of the Civil Code of California is an equitable maxim which must be given a reasonable interpretation (*Bruce Estate* (1938), 27 Cal. App. 2d 44, 80 P. 2d 82). It has been applied to contract actions to prevent a party from accepting the benefits of a contract, but avoiding its obligations by rescission (*Neet v. Holmes* (1944), 25 Cal. 2d 447, 154 P. 2d 854).

Applying the principles of the section to the case at bar would find Murphy liable. He got the benefit from American Seating, but avoided the correlative burden for he received the full subcontract price from Grandy but neglected to pay American Seating. But American Seating already has a judgment against Murphy.

The section doesn't fit Grandy, because Grandy paid full price to Murphy for whatever benefit was received from American Seating's materials. This was according to his contract with Murphy. The materials were actually supplied by Murphy so far as Grandy was concerned.

Would it be reasonable to apply such a maxim to require Grandy to pay twice? It would seem more reasonable to let American Seating bear the brunt of its own credit risk which has since proven to be so ill advised.

IV.

Since the Only Claim Against Grandy Is That Liability Is Implied in Fact or in Law From Grandy's Conduct and Not From the Subcontract or Murphy's Bonds, Joint Liability With the Bonding Company Does Not Exist and a Joint Judgment Is Error.

One of the common defenses in cases of suretyship is that the contract was changed without the consent of the surety. Where this is established to be the fact, the surety is exonerated.

Civil Code, Sec. 2819;

People v. Fidelity & Deposit Co. of Md. (1938),
28 Cal. App. 2d 325, 82 P. 2d 495;

Shuey v. Bunney (1935), 4 Cal. App. 2d 408,
40 P. 2d 859.

The rationale of this principle is that the surety has agreed to be bound to the performance of a certain contract. If this contract is changed, it is in effect a different contract to which the surety is not bound.

This familiar principle is applicable to the case at bar but in even simpler form. Glens Falls agreed to act as Murphy's surety with respect to the subcontract only. This subcontract incorporated the prime contract so far as it was applicable. It was then foreseeable that Murphy might not pay his suppliers and that they could avail themselves of the Miller Act bond required of Grandy who was a principal thereon and that consequently Grandy might have to pay the material suppliers. In such event Glens Falls agreed to indemnify Grandy.

Care must be taken to distinguish between a loss suffered by Grandy in the fashion above described and a loss which Grandy might incur by other contracts. For example, if Grandy agreed to purchase extra material from American Seating and in due course was forced

to pay for it, no one would contend that Glens Falls should have to indemnify Grandy. This was something which Grandy did on its own hook and Glens Falls was in no way involved. It was a separate contract.

In settling whether or not the subcontract surety must indemnify the contractor in a given case, the decision does not turn on the *kind* of obligation involved, but rather on the *source* of the loss. If the subcontract is the source, then the surety is bound to indemnify the contractor. However, if the source of the loss is any other obligation, the surety is not responsible.

Llewellyn Iron Wks. v. Reed (1932), 123 Cal. App. 607, 612, 11 P. 2d 657.

In the instant case, American Seating bases its claims against Grandy upon liability implied in fact or implied in law from the conduct of Grandy in relation to American Seating. This does not depend upon the subcontract and Appellee does not assert that it does.

Bearing in mind this distinction, the claim against Grandy is clearly different from the claim against Glens Falls because they come from different sources. They are independent obligations, if they exist at all. The obligations are not joint and the joint judgment results from a misconception of the basis of liability and is error.

The real importance of this point is that Glens Falls agreed to indemnify Grandy for losses which have their source in the subcontract. Glens Falls did not agree to be responsible for losses the source of which is Grandy's independent and possibly improvident commitments, express or implied.

This points up the very real fact that the two Appellants are independent Appellants, the interests of which are in conflict to the extent stated. For this reason, separate supersedeas bonds were posted [R. 60, 62; Supp. R. 31, 35].

The claim against Grandy must stand or fall alone; and, as pointed out, it is completely alone, in fact, without support from the record.

By a process of elimination the claims against Glens Falls come down to reliance upon the Payment Bond. This is an indemnity bond against loss suffered by Grandy, the source of which must be the subcontract. As the logic of the situation unfolds, it is apparent that there is no claim that Grandy has suffered loss (or even that it has liability) which is traceable to the subcontract as its source. So a judgment against Glens Falls is unsupported in fact and law. The same must again be said of the judgment against Grandy.

V.

The California Cases Are Explicit and Uniform in Holding That Where There Is a Performance Bond and a Payment Bond, Persons Supplying Material to a Subcontractor Cannot Recover on the Performance Bond. (This Supplements the Argument in Appellant's Original Opening Brief, Page 36, and Is Responsive to Point VI-C of Appellee's Supplemental Answering Brief.)

Lamson Co., Inc. v. Jones (1933), 134 Cal. App. 89, 91-92, 24 P. 2d 845 and *Summerbell v. Weller* (1930), 110 Cal. App. 406, 294 Pac. 414, are authority for the point made in the above caption. They cite *Maryland Casualty Co. v. Shafer* (1922), 57 Cal. App. 580, 208 Pac. 192, wherein appears a full discussion of this established principle:

“It is contended that the plaintiff is liable under the faithful performance bond for the claim of Thompson Brothers. In support of such contention the following cases are cited: *French v. Farmer*, 178 Cal. 218 (172 Pac. 1102); *Fuller v. Alturas School Dist.*, 28 Cal. App. 609 (153 Pac. 743);

Callan v. Empire State Surety Co., 20 Cal. App. 483 (129 Pac. 978, 981). If the faithful performance bond were the only one furnished, appellant's position would seem to be invulnerable, but the contract required and Shafer and the plaintiff executed a separate bond in express compliance with the requirements of the act of 1897 (Stats. 1897, p. 201), and acts amendatory thereof, entitled 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work.'

"Liability under a contract of suretyship, as under other contracts, is dependent upon the intention of the parties thereto. In the discussion of a similar question in French v. Farmer, supra, it is said: 'If . . . any effect whatever is to be given to this clause in the condition of the bond, it must be held that it was the intention of the parties to benefit such third persons. . . . The courts of Nebraska, Missouri, Iowa, Indiana, and Michigan seem to hold to the view that if it can be fairly said from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third persons, a suit could be brought on such bond by such third person to recover upon the promise so made for his benefit.' Here, in compliance with the contract and the statute, a separate bond was given to secure payment of claims of the character under consideration and it would be unreasonable to hold that the parties intended the faithful performance bond to secure the same claims. The Statute of 1897 (as amended by Stats. 1911, p. 1422) provides that the claimants 'shall, within ninety days from the time such contract is completed, file with the . . . board of supervisors . . . a verified statement of such claim.' Concededly appel-

lant failed to file such a claim and is therefore precluded from recovering on the bond given pursuant to the requirements of that statute. Such failure affords no ground for relief under the faithful performance bond manifestly intended for a different purpose.” (57 Cal. App. 580, 582.) (Emphasis added.)

While Appellee sounds a derisive note on the question of the value of ascertaining the intention of the parties in connection with this problem, it should be remembered that the matter of intention is common to all contracts (*United Airlines, Inc. v. Western Airlines* (1955), 132 Cal. App. 2d 308, 282 P. 2d 118, holding that indemnity agreements like other contracts are to be interpreted so as to give effect to the mutual intention of the parties, citing Civ. Code, Sec. 1636). The court expressly recognizes this legal concept in the foregoing quotation. It is a matter of interest to observe that it was Appellee American Seating which asked E. F. Grandy to state his purpose in requiring Murphy to furnish the payment bond. His reply was that it was required to protect Grandy against loss, and no one else [R. 22, 27].

Appellee has misconstrued Professor Corbin's view of the importance of ascertaining the intention of the parties. This is probably due to the fact that the quotation from the case of *Socony-Vacuum Oil Co. v. Continental Casualty Co.* (C. A. 2d, 1955), 219 F. 2d 645, which appears on page 18 of Appellee's Supplemental Answering Brief, is not properly punctuated. Professor Corbin's comment is an inside quote which should stop at the end of the next to the last sentence. The balance of the quotation is the court's comment in ascertaining the law of the State of Vermont in the absence of any decision of the courts of that state and in the absence of statute on the subject. Moreover, there was only one bond which expressly required the subcontractor to “pay all labor and material obligations.”

The decision in the case at bar must be made in quite different circumstances because the law of the State of California has already been declared by the Legislature and the courts of California. It is, of course, the duty of this Honorable Court to apply the law of the State of California as so declared.

Coming back to Professor Corbin's words, and to put them in the right context, the paragraph immediately following the one quoted in the *Socony-Vacuum Oil* case reads as follows:

"A 'simpler' question, but not always a simple one. There will continue to be badly drawn bonds, although clarifying the law would tend toward improvement in draftsmanship. A fair share of the past litigation has been due to doubtful interpretation; such litigation cannot altogether be avoided. Nor is it meant that 'intention to benefit' can be wholly eliminated from third party beneficiary law. It is merely asserted that in the case of a surety bond for the payment of money, if there is a promise to pay money to an ascertainable person, the fact that he is a third person who gave no consideration for the promise does not prevent him from enforcing it. The fact that he was not identified at the time of making the contract does not prevent him from being 'ascertainable' at the time of performance." (4 Corbin on Contracts 164.)

To complete the point that Professor Corbin recognizes that sound principles are not violated by the position taken by Appellants in this action on the point presently under discussion and others, we quote from Section 800 of the same work:

"A promise to indemnify the promisee against loss is one that could be fully performed, in many instances, without paying anything to the third persons.

Even if they have power to put a lien on the promisee's property, they may not do so in fact, or the lien that is put on may be disposed of otherwise than by paying the debt. Such a promise therefore cannot surely be said to have been 'intended' for the benefit of the third persons, since the promised performance will not necessarily benefit them. And to give the third party a judgment for his debt would often compel the surety to do more than he promised to do.

"If on reasonable interpretation the surety bond contains no promise to pay laborers and materialmen, of course they have no right against the surety. There are numerous cases, even in states where the rights of third party beneficiaries are fully recognized, holding that the particular bond in suit contained no promise to pay the third parties who were suing." (4 Corbin on Contracts 174.)

In the first quotation above Professor Corbin urges clarifying the law of interpretation of surety contracts. This may be done by court construction or more directly by statute. It is implicit in Professor Corbin's discussion that such contracts must be construed according to the law when thus established. California decisions above cited leave no doubt as to the law of California. Where in compliance with the contract a performance bond *and* a payment bond are given, persons supplying materials cannot recover on the performance bond because a contract is to be interpreted according to what the parties intended.

As heretofore pointed out in Appellants' Opening Brief and in Appellants' Supplemental Opening Brief, the intention of the parties to the subcontract is clearly ascertainable. The answer to interrogatory 27 [R. 22] and to request for admissions 4 [R. 27] affirm it. The two bonds were given to protect the contractor, and no one else. It was unnecessary to have solicitude for the ma-

terialmen because they were already amply protected by the Miller Act bond of the prime contractor, GRANDY. GRANDY, alone, was faced with the risk of loss, and he required the bonds as protection.

It is significant that there is no provision in the performance bond which provides that it is for the use or benefit of materialmen. The only way that any benefit to materialmen may be "read into the bond" is by implication and for this purpose Appellee's sole reliance is upon *Pacific States Co. v. Fidelity & G. Co.* (1930), 109 Cal. App. 691, 293 Pac. 812.

The *Pacific States* case is very different and the rationale of the court very clear. The court looked to the *intention* of the parties and quoted with approval the reasoning from another case at page 694 of the California report, as follows:

" . . . 'The true meaning and intent of the provision requiring the contractor to furnish materials was certainly that he should pay for them, and not that he should simply supply them and leave respondent to pay for them. This is the only reasonable deduction from such an agreement.' "

By his agreement with the owners and according to statute, the contractor in the *Pacific States* case had posted a bond to guarantee payment of all materialmen. Persons who supplied materials to a subcontractor could sue the contractor on this bond. The contractor in turn exacted a *single* bond from his subcontractor. Obviously, the contractor had to look to that bond alone for his protection.

The court concluded that the contractor must have intended protection against claims of materialmen which the contractor would otherwise have to pay and that therefore the bond was not designed exclusively to guarantee completion of the work, but also to guarantee that the

subcontractor would pay the claims of his suppliers for the protection of the contractor.

Having thus determined that the bond was intended to assure payment to the suppliers of material, they were entitled to sue on the bond. Bear in mind that the reason for implying the promise to pay material suppliers is that otherwise the contractor would not have received protection against having to pay the claims himself and this was the very thing which the bond was intended to furnish.

In the case before this court, the danger of loss to GRANDY, the contractor, due to the failure of the subcontractor to pay materialmen was the subject of a separate obligation of the surety (the Payment Bond), which was entirely adequate for this purpose. The reason for the ruling in the *Pacific States* case is therefore entirely lacking in the case at bar. It is a familiar axiom that when the determination in the *Pacific States* case of intention of parties to a particular contract may be considered to be a rule at all.

“When the reason of a rule ceases, so should the rule itself.” (Civ. Code, Sec. 3510.)

The *Pacific States* case is not in conflict with nor an exception to the rule that where there is a performance bond and a payment bond, persons supplying materials to a subcontractor cannot recover on the performance bond which is not expressly for their benefit. This is a general rule recognized expressly in *Daniel-Morris Co. v. Glens Falls Indemnity Company* (1955), 308 N. Y. 464, 126 N. E. 2d 750, 752, and by Professor Corbin on page 25 of the 1956 Pocket Part to 4 Corbin on Contracts.

Where there is plainly stated obligation, such as in the *Socony-Vacuum* case, there is no need to imply a promise to pay materialmen as was necessary to reach the conclusion of the *Pacific States* case. And it seems odd to quote with emphasis from the *Socony-Vacuum* case. (App.

Supp. Ans. Br. p. 20) that “it is an unfortunate doctrine to modify the scope of a plainly stated written obligation in a private bond by the supposed motive of the obligee . . .” when Appellee’s objective is to accomplish that very purpose by implying an obligation of payment in a performance bond when a payment bond was furnished at the same time and in the same transaction.

The rule that the performance bond is not available to Appellee stands unimpeached by any authority.

VI.

None of the Authorities Cited by Appellee Are Authority for Recovery Against the Performance Bond. (This Is Responsive to Point VI-C of Appellee’s Supplemental Answering Brief.)

A. *Pacific States Co. v. U. S. Fidelity and G. Co.* Does Not Construe a Performance Bond.

The reasoning and application of the *Pacific States* case was discussed in Section V of this brief and what was said there will not be repeated. *The California Supreme Court did not decide the Pacific States case!* Hearing in the Supreme Court was not even requested. We still don’t know what that court would say in the circumstances. The cases decided in 109 California Reports were decided in 1895. The *Pacific States* case was decided by the District Court of Appeal in 1930.

It involved a single all purpose bond—not a performance bond. It did not hold that the performance bond in this case includes a promise to pay materialmen as Appellee claims on pages 20, 21 and 22 of its Supplemental Brief. The Supreme Court of this State has *not* held that the language of *any* performance bond by implication included a promise to pay materialmen as claimed by Appellee in its Supplemental Brief, page 22. Neither does the *Socony-Vacuum* case involve even the

same problem as the *Pacific States* case. Professor Corbin does not cite it.

Appellee's argument lacks logical application of authority. A cursory reading of the *Pacific States* case lays plain the fact that the bond involved was not a performance bond, but a single all purpose bond. More than that, it reveals that the case was not decided according to the plain language of the bond, but upon the ascertainable intent of the parties in the light of the circumstances of the case. It does not purport to lay down a rule of law for performance bonds.

B. The Socony-Vacuum Case Does Not Involve the Problem of the Pacific States Case.

A single all purpose bond is involved in the *Socony-Vacuum* case as in the *Pacific States* case. There the similarity ends because the former involves a bond where the obligation is that the subcontractor "shall pay all labor and material obligations" while the obligation in the latter is limited in that the subcontractor "shall well and faithfully keep and perform all of the covenants and agreements of said contract."

The California court would have had no difficulty in deciding that the materialmen could sue under the terms of the bond in the *Socony-Vacuum* case, but there is no way of telling how the United States Court of Appeals for the Second Circuit would have ruled had the bond in the Vermont case been conditional upon performance alone. The doubt is cast by the insistence of the Federal Court that the court should not rewrite the contracts of the parties:

" . . . Were we to hold otherwise, we should in effect, by substituting a mere contract for indemnity for the bond which was made, be presenting the defendant surety company with an unearned windfall." (219 F. 2d 645, 649.)

C. Both the McGrath Case and the Daniel-Morris Case Involved Payment Bonds. They Do Not Support Appellee's Attempt to Recover on a Performance Bond.

In both of the New York cases above named there were performance bonds. *No suit was filed on these performance bonds for the reason that they were not available to materialmen.* (*Daniel-Morris Co. v. Glens Falls Indemnity Company* (1955), 308 N. Y. 464, 126 N. E. 2d 750, 752.)

Both of these New York cases struggle with the problem of deciding whether the payment bonds are or are not strict contracts of indemnity. In the *McGrath* case the bond was held to be a contract of indemnity against liability. The court explained:

"This conclusion is not altered by the circumstance that the bond upon which the action is based is conditioned upon payment by the subcontractor of its obligations to laborers and materialmen. This condition merely described the events in which the general contractor could have recourse to the bond, if it were harassed by losses due to neglect of the subcontractor to satisfy these obligations." (*McGrath v. American Surety Company of New York* (1954), 307 N. Y. 552, 122 N. E. 2d 906, 907.)

This decision had to be made in the absence of statute in accordance with principles of the common law as established by judicial precedent. The principle of *strictissimi juris* prevailed in the early cases resulting in construing the intentions of the contracting parties in favor of holding the contracts to be contracts of indemnity.

Daniel-Morris Co. v. Glens Falls Indemnity Company (1955), 308 N. Y. 464, 126 N. E. 2d 750, considered a bond conditioned, "if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract

. . . then this obligation to be void.” The court construed the bond and the subcontract together, as is always done. The subcontract promised materials “free of the lien of any third party.” This was obviously not simply a contract of indemnity and the materialmen were allowed to sue the surety directly. The result in each case coincided with the principles for construction of such contracts in the State of New York.

The criticism directed against these cases by Professor Corbin and by the opinion in the *Socony-Vacuum* case was not that they did not conform to the law of New York, but that they did not conform to the weight of modern authority in states where the interpretation of similar contracts is up to the courts and uncontrolled by statute. Professor Corbin points out that the decision in the *McGrath* case makes for circuity of actions by requiring three suits instead of one, although if the liability indemnified against is present, it is certain that the materialman will recover in the end. He thinks that the courts should cut the Gordian knot even at the expense of breaking with precedent.

This criticism has no application to the California law for three reasons: First, it seems unlikely that the California courts would refuse to permit the materialman to sue the surety where the bond is conditioned as in the *McGrath* case. Second, the bonds in the *McGrath* and *Daniel-Morris* cases are bonds against liability and not indemnity bonds against loss or damage. Third, the law of the State of California is established by statute which is strictly adhered to by the courts. (*Thode v. McAmis* (1950), 96 Cal. App. 2d 833, 216 P. 2d 548.)

Where the contract is strictly one of indemnity against loss or damage, Professor Corbin recognizes:

“A promise to indemnify the promisee against loss is one that could be fully performed, in many in-

stances, without paying anything to the third persons. . . . Such a promise therefore cannot surely be said to have been 'intended' for the benefit of the third persons, since the promised performance will not necessarily benefit them. And to give the third party a judgment for his debt would often compel the surety to do more than he promised to do." (4 Corbin on Contracts, 174.)

It is this type of bond indemnifying against loss which is before the court in this case and the rule for its construction is established by Civil Code, Section 2778(2). Such a rule is not subject to the objection that the parties are left with any uncertainty as to its meaning for the statute is as much a part of the bond as if written into it. (*Thode v. McAmis* (1950), 96 Cal. App. 2d 833, 216 P. 2d 548.)

VII.

The Payment Bond Is Not Available to Appellee.

There is one reason more compelling than any other why Appellee cannot recover on the payment bond. This reason was not touched upon in the Supplemental Reply Brief of Appellee. It is unanswerable and well established and there is no authority to the contrary.

GRANDY must have actually paid a loss against which he has been indemnified before the surety is liable. No cause of action accrues in favor of Appellee until this has happened. In Section IV of the brief it was pointed out that such a loss could not be sustained by GRANDY at this point or as the result of the within action. But it is an admitted fact that he has not in fact paid such a loss.

California Civil Code, Section 2778, subsection two provides:

"Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent

terms, the person indemnified *is not entitled to recover without payment thereof . . .*” (Emphasis added.)

The latest case construing this section is *Thode v. McAmis* (1950), 96 Cal. App. 2d 833, 836, 216 P. 2d 548, wherein the court says:

“We think the bond involved here permits of no such construction as will afford appellants any claim against the insurance company. The language of the bond is clear. It is strictly a contract of indemnity. The language used is apt and free from ambiguity. The insurance company does not undertake or guarantee that the contractor will perform the contract or that liens may not be established against improvements and the ground upon which they are to be constructed, but on the contrary undertakes to indemnify the owner against such loss or damage, if any, as the owner may suffer if the principal does fail or if such liens are finally established. Such a contract affords a remedy to the owner to the extent of such loss only, and only after a loss has been actually paid by the owner. (Civ. Code, Sec. 2778.) This latter condition, of course, expressed in the cited code section, is as much a part of the instrument as though set out therein. Contracts of suretyship are to be interpreted under the same rules to be observed in the case of other contracts. (Civ. Code, Sec. 2837.) The parties to this contract are only the contractor, the owner and the insurance company, and every provision of the contract can be given full application without consideration of any other persons. It results therefore that appellants had no right of action upon this bond.”

VIII.

The Trial Court Abused Its Discretion in Denying Appellants' Motion Under Federal Rules of Civil Procedure, Section 60b. (This Section is Responsive to Section II, Pages 3 to 6, Inclusive, and Section VI-A, Pages 11 to 14, Inclusive of Appellee's Supplemental Answering Brief.)

We have deliberately left discussion on this point to the last because it was covered in detail in Appellants' Supplemental Opening Brief and the Appendix thereto. In effect the only answer which has been made to this ground of appeal is to deny that the record shows that the decision of the trial court was made without sufficient understanding of the case.

Such an issue can only be determined by this court by an examination of the proceedings in the trial court. The fact remains that even when the judgment was amended to correct the obvious errors, appropriate modification of the Findings and Conclusions of Law was not permitted. Appellants respectfully submit that the opposition to any reconsideration of the Findings and of the Conclusions of Law was out of fear that a re-examination of the Findings would bring substantial changes to bring them into line with the record resulting in recognition of the trial court's error and judgment for Appellants.

Appellants deem it a significant fact that Appellee has not disputed the recital of the proceedings in the trial court in any particular, but has chosen to quote piecemeal from the record in a manner which does not fairly reflect the true situation. Appellants hope that the brevity of this point answers the accusation that Appellants devoted themselves to this question in a way designed to submerge the merits of the case.

Appellants subscribe to the principle that there must be an end to litigation, but urge that such an end should be in accordance with the fundamental principles of justice.

Conclusion.

For all of the reasons above stated, Appellants respectfully submit that the judgment should be reversed with instructions to enter judgment in favor of Appellants.

Respectfully submitted,

JOHN E. MCCALL and

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No. 15169

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

JACK LEWIS AND JOE LEVITAN, a Copart-
nership Doing Business as CALIFORNIA
FOOTWEAR COMPANY and TRINA SHOE
COMPANY, a Corporation,
Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

DEC - 3 1956



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Consolidated Complaint	3
Amendment to Amended Consolidated Complaint	8
Answer of California Footwear Co.	9
Answer of Trina Shoe Co.	12
Answer to Petition for Enforcement	373
Attorneys of Record	1
Certificate of the National Labor Relations Board	366
Charge Against Employer	15
Decision and Order	131
Exhibits, General Counsel's:	
No. 1-N—Answer of California Footwear Co.	9
1-O—Answer of Trina Shoe Co.	12
1-R—Amended Consolidated Complaint	3
1-T—Amendment to Amended Consolidated Complaint	8

Exhibits, General Counsel's—(Continued):

No. 3	—August, 1953, Advances and Expenditures of Trina Shoe Co. . . .	323
4	—Agreement to Buy and Sell Footwear	324
5	—Sublease	326
6	—Promissory Note	335
7	—Mortgage Dated March 21, 1953	336
10	—Letter Dated February 19, 1953	348
12	—Contract, 1953 (Portion of) . . .	350
13-A	—Letter Dated July 14, 1953	356
13-B	—Letter Dated July 14, 1953	358
14	—Letter Dated March 18, 1953 . . .	360
22-A	—Charge Against Employer	15
22-G	—Order of Trial Examiner	18
22-J	—Supplement to Amended Consolidated Complaint	19

Exhibits, Respondents'

No. 14	—Statement of Facts	361
18	—Letter Dated March 19, 1953 . . .	363
19	—Letter Dated December 4, 1953.	364
Intermediate Report and Recommended Order		26
Order of Trial Examiner Reopening Hearing		18
Petition for Enforcement of an Order of the N.L.R.B.		370

INDEX

PAGE

Respondents' Exceptions to Intermediate Report	21
Statement of Points Relied Upon by the Board	376
Statement of Points Relied Upon by Respondents	374
Supplement to Amended Consolidated Complaint	19
Transcript of Proceedings	158
Witnesses, General Counsel's:	
Testimony of:	
Cherry, Anna C.	206
Fellman, Maurice	164, 306
Greenberg, Herman	321
Lewis, Jack	191, 314
Murray, Linda	242
Murray, Lois Hartents	222
Parker, Charlotte	219
Piasek, Eugene	225, 308
Roark, Blanche	211
Rosenthal, Jack	238
Small, Gertrude	209
Smith, Etheline	216
Tutt, Ernest	192

	INDEX	PAGE
Witnesses, Respondents':		
Testimony of:		
Fellman, Maurice		281
Levitan, Joseph		305
Lewis, Albert		304
Lewis, Jack		261, 318
Perkins, Richard		315
Piasek, Eugene		253
Tutt, Ernest		301

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United States of America Before the National
Labor Relations Board, Twenty-First Region

Case No. 21-CA-1659

In the Matter of

JACK LEWIS AND JOE LEVITAN dba CALI-
FORNIA FOOTWEAR COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Case No. 21-CA-1658

In the Matter of

TRINA SHOE COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

AMENDED CONSOLIDATED COMPLAINT

It having been charged by United Shoe Workers of America, Local 122, a labor organization, hereinafter called the Union, that Jack Lewis and Joe Levitan d/b/a California Footwear Company, hereinafter called California Footwear; and Trina Shoe Company, hereinafter called Trina (said Companies being referred to herein collectively as Respondents), have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Rela-

tions Act, as amended, and Public Law 101, 80th Congress, First Session, hereinafter called the Act; the General Counsel of the National Labor Relations Board, on behalf of the Board, having issued its Order of Consolidation, the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15, hereby issues this Amended Consolidated Complaint and alleges as follows:

1. Jack Lewis and Joe Levitan, doing business as a copartnership under the firm name of California Footwear Company, are engaged in the manufacture and wholesale distribution of footwear. During the 12-month period ending December 31, 1952, California Footwear shipped products valued in excess of \$25,000 directly to points outside the State of California.

2. Trina Shoe Company, a California corporation, is engaged in the manufacture and wholesale distribution of footwear. During the 12-month period ending June 30, 1953, Trina shipped products valued in excess of \$25,000 directly to points outside the State of California.

3. Trina is and has been since on or about February 1, 1953, a part of, successor to, and the alter ego of California Footwear for purposes of the Act.

4. Respondents and each of them are and at all times material herein have been engaged in commerce within the meaning of the Act.

5. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

6. The Union was certified by the National Labor Relations Board on August 20, 1951, as a representative of the employees of California Footwear in an appropriate unit as follows:

All production workers, excluding executive, administrative, sales, clerical, maintenance employees, truck driver, guards, professional and supervisory employees as defined in the Act.

7. All production workers employed in the California Footwear plant at 253 South Los Angeles Street, Los Angeles, California, prior to about February 1, 1953, and all production workers employed at its plant at 222 Main Street, Venice, California, since its move from the former address to the latter on or about February 1, 1953, and all production workers employed in the Trina plant at 222 Main Street, Venice, California; with exclusions as set out in paragraph 6 hereof, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

8. At all times since on or about August 20, 1951, the Union has been and now is the duly designated collective bargaining representative of the unit set forth in paragraphs 6 and 7 hereof.

9. From on or about January 1, 1953, to the date hereof, California Footwear, by its officers, agents, and representatives, has failed and refused, and does now fail and refuse, to bargain collectively in

good faith with the Union with respect to wages, hours and conditions of employment of the employees of the unit set forth in paragraph 6 hereof, although frequently requested to do so by the Union, including, but not by way of limitation, specific requests on March 24, 1953, and March 31, 1953.

10. From on or about February 19, 1953, to the date hereof, Trina, by its officers, agents and representatives, has failed and refused, and does now fail and refuse, to bargain collectively in good faith with the Union with respect to wages, hours and conditions of employment of the employees of the unit set forth in paragraph 6 hereof, although frequently requested to do so by the Union, including, but not by way of limitation, specific requests on March 24, 1953, and March 31, 1953.

11. By the acts and conduct set forth in paragraphs 9 and 10 above, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

12. On the respective dates indicated, Respondents, and each of them, discriminatorily discharged the following employees to discourage membership in the Union:

Date	Name
April 2, 1953.....	Anna C. Cherry
April 6, 1953.....	Ruby Lee Walker
April 28, 1953.....	Jack Rosenthal

13. By the acts described in paragraph 12 above, Respondents, and each of them, did engage in and

are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

14. By the acts described in paragraphs 9 through 13 above, and by each of said acts, by interrogation of employees concerning their union membership and activities, by surveillance of union activities, by delivery of an anti-Union speech on or about March 15, 1953, followed by refusing to permit the Union to reply to same under similar circumstances, and by promises of wage increases and threats of retaliation, Respondents, and each of them, did interfere with, restrain and coerce and are interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

15. The activities of Respondents set forth in paragraphs 9 through 13, and occurring in connection with Respondents' operations described in paragraphs 1, 2 and 3 hereof, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 30th day of September, 1953, issues this Amended Consolidated Complaint against Jack Lewis and Joe Levitan, a copartnership doing busi-

ness under the firm name of California Footwear Company, and Trina Shoe Company, Respondents herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director National Labor Relations Board,
Twenty-First Region.

[Received in evidence as General Counsel's Exhibit No. 1-R, October 13, 1953.]

Before the National Labor Relations Board
[Title of Causes.]

AMENDMENT TO AMENDED
CONSOLIDATED COMPLAINT

The Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15, hereby issues this Amendment to Amended Consolidated Complaint:

Paragraph 12 of the Amended Consolidated Complaint herein is amended by the addition of the following:

(1) 12A. On or about February 1, 1953, and again on or about February 9, 1953, Respondents and each of them discriminatorily failed and refused to employ, or in the alternative did discriminatorily discharge one Blanche Roarke to discourage membership in the Union.

(2) Paragraph 13 is amended by adding to line one thereof, following the words "paragraph 12" the additional words "and paragraph 12A."

(3) Paragraph 14 is amended by adding to line one thereof, following the words "through 13" the additional words "and paragraph 12A."

(4) Paragraph 15 is amended by adding to line two thereof, following the words "through 13" the additional words "and paragraph 12A."

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 12th day of October, 1953, issues this Amendment to Amended Consolidated Complaint against Jack Lewis and Joe Levitan, a copartnership doing business under the firm name of California Footwear Company, and Trina Shoe Company, Respondents herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director National Labor Relations Board,
Twenty-First Region.

[Received in evidence as General Counsel's Exhibit No. 1-T, October 13, 1953.]

Before the National Labor Relations Board
[Title of Causes.]

**ANSWER OF CALIFORNIA
FOOTWEAR COMPANY**

Jack Lewis and Joseph Levitan doing business as California Footwear Co., answering the consolidated complaint for themselves alone, admit, deny, and allege as follows:

I.

Admit the allegations of paragraph I of the complaint, except that they deny that they are engaged in the manufacture of footwear.

II.

Admit that Trina Shoe Company is engaged in the manufacture of footwear, but deny each and every other allegation of paragraph II of the complaint.

III.

Deny generally and specifically each and every allegation of paragraphs III, IV, VI, VII, VIII, X, XI, XII, XIII, and XIV of the complaint.

IV.

Admit the allegations of paragraph V of the complaint.

V.

On information and belief admit the allegations of paragraph IX.

And for a Separate and Affirmative Defense to the Complaint Herein, These Answering Respondents Allege:

I.

That the General Counsel of the National Labor Relations Board and the charging party are estopped to maintain this proceeding for the following reasons:

(1) This proceeding has the purpose and effect of enforcing a labor contract which contains an illegal Union Security clause;

(2) As the General Counsel through his agents well knows, said charging party in this proceeding is currently prosecuting an action against these respondents in the Superior Court of Los Angeles County, California, seeking, among other things, to enforce against these respondents Section 923 of the Labor Code of the State of California. Said State Court action constitutes an encroachment upon and usurpation of the Federal power as expressed in the Labor Management Relations Act, 1947. Although the General Counsel has been requested to protect these respondents against such unwarranted State Court action (as he has protected Unions similarly situated) he has refused to furnish these respondents any protection. The prosecution of the instant proceeding against these respondents in the circumstances violates these respondents' constitutional rights.

/s/ RICHARD A. PERKINS,
Attorney for Said Respondents.

State of California,
County of Los Angeles—ss.

Jack Lewis, being sworn says:

That he is a member of California Footwear Co., a copartnership and authorized to make this verifi-

cation on its behalf; that he has read the foregoing Answer to Complaint and knows the contents thereof and that the same are true of his own knowledge, except as to matters stated on information and belief, and as to those matters he is informed and believes the same to be true.

/s/ JACK LEWIS.

Subscribed and sworn to before me this 29th day of July, 1953.

[Seal] /s/ ANN FLINKMAN,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires 4/29/57.

[Received in evidence as General Counsel's Exhibit No. 1-N, October 13, 1953.]

Before the National Labor Relations Board
[Title of Causes.]

ANSWER OF TRINA SHOE COMPANY

Trina Shoe Company, a corporation, answering the consolidated complaint for itself alone, admits, denies, and alleges as follows:

I.

On information and belief admits the allegations of paragraph 1 of the complaint, except that it denies that California Footwear Company is engaged in the manufacture of footwear.

II.

Admits that it is engaged in the manufacture of footwear, but denies each and every other allegation of paragraph 2 of the complaint.

III.

Denies generally and specifically each and every allegation of paragraphs 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14 of the complaint.

IV.

Admits the allegations of paragraph 5 of the complaint.

V.

Admits the allegations of paragraph 9 of the complaint and alleges that the Union is not the collective bargaining representative of this respondent's employees.

And for a Separate and Affirmative Defense to the Complaint Herein, This Answering Respondent Alleges:

I.

That the General Counsel of the National Labor Relations Board and the charging party are estopped to maintain this proceeding for the following reasons:

(1) This proceeding has the purpose and effect of enforcing a labor contract which contains an illegal Union Security clause;

(2) As the General Counsel through his agents well knows, said charging party in this proceeding

is currently prosecuting an action against this respondent in the Superior Court of Los Angeles County, California, seeking, among other things, to enforce against this respondent Section 923 of the Labor Code of the State of California. Said State Court action constitutes an encroachment upon and usurpation of the Federal power as expressed in the Labor Management Relations Act, 1947. Although the General Counsel has been requested to protect this respondent against such unwarranted State Court action (as he has protected Unions similarly situated) he has refused to furnish this respondent any protection. The prosecution of the instant proceeding against this respondent in the circumstances violates this respondent's constitutional rights.

/s/ RICHARD A. PERKINS,
Attorney for Said Respondent.

State of California,
County of Los Angeles—ss.

Maurice Fellman, being sworn, says:

That he is President of Trina Shoe Company, a corporation, and is authorized to make this verification on its behalf; that he has read the foregoing Answer to Complaint and knows the contents thereof and that the same are true of his own knowledge, except as to matters stated on information and belief, and as to those matters he is informed and believes the same to be true.

/s/ MAURICE FELLMAN.

Subscribed and sworn to before me this 29th day of July, 1953.

[Seal] /s/ ANN FLINKMAN,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires 4/29/57.

[Received in evidence as General Counsel's Exhibit No. 1-O, October 13, 1953.]

Form NLRB-501

United States of America, National
Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-1863.

Date Filed: 11/27/53.

Compliance Status Checked By: D. B.

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought:

Name of Employer: California Footwear Company and Trina Shoe Company.

Address of Establishment: 222 South Main Street, Venice, California.

Number of Workers Employed: 15.

Nature of Employer's Business: Manufacturing shoes and footwear.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (4) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about November 21, 1953, the Employers discharged one Eugene Piasek for the reason that he had testified in a National Labor Relations Board hearing on November 13, 1953, and in order to discourage membership in the undersigned labor organization.

3. Full Name of Labor Organization:

United Shoe Workers of America, Local 122, CIO.

4. Address:

617 Venice Boulevard, Los Angeles 15, California.

Telephone No.: RIchmond 7-5329.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

United Shoe Workers of America, CIO.

6. Address of National or International, if any:

617 Venice Boulevard, Los Angeles 15, California.

Telephone No.: RIchmond 7-5329.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ ERNEST TUTT,
Organizer.

Date: November 27, 1953.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 22-A, January 5, 1954.]

Before the National Labor Relations Board

[Title of Causes.]

ORDER

Upon motion of counsel for the General Counsel, dated December 3, 1953, to reopen the hearing in the above-entitled matter for the purpose of adducing evidence concerning the alleged discrimination against Eugene Piasek on November 21, 1953, it is hereby

Ordered that the hearing in the above-entitled matter be and the same hereby is reopened and a further hearing herein shall be conducted at a time and place to be set by the Regional Director upon not less than five days' notice to all parties hereto.

Dated this 8th day of December, 1953.

/s/ JAMES R. HEMINGWAY,
Trial Examiner.

[Stamped]: Received December 9, 1953.

[Received in evidence as General Counsel's Exhibit No. 22-G, January 5, 1954.]

United States of America Before the National
Labor Relations Board, Twenty-First Region

Case No. 21-CA-1659

In the Matter of

JACK LEWIS AND JOE LEVITAN dba CALI-
FORNIA FOOTWEAR COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Case No. 21-CA-1658

In the Matter of

TRINA SHOE COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Case No. 21-CA-1863

In the Matter of

JACK LEWIS AND JOE LEVITAN dba CALI-
FORNIA FOOTWEAR COMPANY and
TRINA SHOE COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

SUPPLEMENT TO AMENDED
CONSOLIDATED COMPLAINT

The Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15, hereby issues this Supplement to Amended Consolidated Complaint:

1. On or about November 21, 1953, Respondents, and each of them, discriminatorily discharged Eugene Piasek to discourage membership in the Union and for the reason that he had given testimony under the Act.

2. On the following workdays Respondents, and each of them, discriminatorily laid off Eugene Piasek to discourage membership in the Union: October 16, 19, 20, 21, 22, 23; November 5, 6, 9, 11, 1953.

3. By the acts set forth in paragraphs 1 and 2 above, Respondents and each of them, did engage in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By the acts set forth in paragraph 1 above, Respondents and each of them, did engage in and are engaging in unfair labor practices within the meaning of Section 8 (a) (4) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, this 10th day of December, 1953, issues this Sup-

plement to Amended Consolidated Complaint against Respondents herein.

[Seal]: /s/ HOWARD F. LeBARON,
Regional Director National Labor Relations Board,
Twenty-First Region.

[Received in evidence as General Counsel's Exhibit No. 22-J, January 5, 1954.]

Before the National Labor Relations Board
[Title of Causes.]

RESPONDENTS' EXCEPTIONS TO INTERMEDIATE REPORT

Respondents California Footwear Company and Trina Shoe Company hereby except to the Intermediate Report herein as follows:

Respondents except:

1. To the order of August 28, 1953, striking portions of respondents' answers (I.R., page 2, lines 18-20).

2. To denial of respondents' motion to quash subpoenas (I.R., page 2, lines 44-45).

3. To the refusal of the trial examiner to grant respondents' motions to dismiss the complaints and portions thereof (I.R., page 3, lines 7-11).

4. To denial of respondents' motion to dismiss the supplemental complaint (I.R., page 3, lines 30-41).

5. To the matter beginning with the word "from" at line 19 and ending with the word "cost" in line 21, page 7, I.R.

6. To the matter beginning with the word "however" in line 39 and ending with the word "that" in line 41, page 8, I.R.

7. To the matter beginning with the word "there," line 50, page 8, and ending with the word "two," line 1, page 9, I.R.

8. To the word "credibly" in line 24, page 9, I.R.

9. To the matter beginning with the word "I" in line 54 and ending with the word "existed" in line 55, page 9, I.R.

10. To the matter beginning with the word "I" in line 2 and ending with the word "occurred" in line 4, page 11, I.R.

11. To the matter beginning with the word "with" in line 12 and ending with the word "supervising" in line 14, page 11, I.R.

12. To the matter beginning with the word "however" in line 23 and ending with the word "inspection" in line 27, page 11, I.R.

13. To the matter beginning with the word "in" in line 7 and ending with the word "machine" in line 11, page 12, I.R.

14. To the matter contained in lines 16 to 20, page 12, I.R.

15. To the matter contained in lines 10 to 28, page 13, I.R.

16. To the matter contained in lines 30 to 50, page 13, I.R.

17. To the matter contained in lines 55 to 61, page 13, and lines 1-13, page 14, I.R.

18. To the matter beginning with the word "rather" in line 9, page 19, and ending with the word "suppositions" in line 24, page 20, I.R.

19. To the matter beginning with the word "one" in line 44 and ending with the figures "536" in line 49, page 19, I.R.

20. To the words "especially with Lewis and Fellman" in line 32, page 20, I.R.

21. To the matter appearing from line 1 to line 20, page 21, I.R.

22. To the matter beginning with the word "after" in line 27 and ending with the word "city" in line 42, page 21, I.R.

23. To the matter beginning with the word "it" in line 55 and ending with the word "version" in line 60, page 21, I.R.

24. To the matter contained in footnote No. 28, pages 21 and 22, I.R., except the first sentence thereof.

25. To the matter beginning with the word "it" in line 47, page 22, and ending with line 24 on page 23, I.R.

26. To the matter beginning with the word "I" in line 41 and ending with the word "union" in line 53, page 24, I.R.

27. To the matter in footnote No. 31 on page 24, I.R.

28. To the matter beginning with the words "the only" in line 3 and ending with the word "Act" in line 8, page 25, I.R.

29. To the matter beginning with the name "Roark" in line 45 and ending with the word "plant" in line 54, page 25, I.R.

30. To the matter beginning with the word "apparently" in line 7 and ending with the word "but" in line 6, page 26, I.R.

31. To the matter beginning with the name "Fellman" in line 9, and ending with the word "have" in line 10, page 26, I.R.

32. To the matter beginning with line 50, page 26, and ending with line 20, page 28, I.R.

33. To the matter beginning with the word "but" in line 15 and ending with the word "it" in line 20, page 31, I.R.

34. To the matter beginning with the word "after" in line 33 and ending with the word "period" in line 35, page 32, I.R.

35. To the words "Piasek did overtime work after Rosenthal left" in line 61, on page 32 and line 1, on page 33, I.R.

36. To the words "Lewis asked Piasek about his membership in the Union" in lines 33 and 34, on page 33, I.R.

37. To the matter beginning with the word "but" in line 4 and ending with the name "Piasek" in line 5, page 34, I.R.

38. To the matter beginning with the word "of" in line 47 and ending with the name "Piasek" in line 52, page 34, I.R.

39. To the matter beginning with line 54, on page 34 and ending with the name "Piasek" in line 5, page 35, I.R.

40. To the matter contained in footnote 40, on page 35, I.R.

41. To the matter beginning with the words "the question" in line 23, page 36, and ending with the word "Act" in line 34, on page 38, I.R.

42. To the matter in lines 3 to 8, on page 39, I.R.

43. To conclusions of law Nos. 2, 3, 5, 6, 7, and 8. on pages 40 and 41, I.R.

44. To the matter beginning with the name "Jack Lewis" in line 18, page 41, and ending with the word "aforesaid" in line 35, on page 42, I.R.

Brief

[Beginning with the heading entitled Brief, pages 4 thru 6* constitute the brief portion of this document and for that reason are not considered a part of the certified record.]

Respectfully submitted,

RICHARD A. PERKINS,
Attorney for Respondents.

Received June 3, 1954.

*Page Nos. appearing on original document.

United States of America

Before the National Labor Relations Board

JEROME SMITH,

For the General Counsel.

RICHARD A. PERKINS,

For the Respondents.

MILTON S. TYRE and ERNEST TUTT,

For the Union.

Before: James R. Hemingway, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

On April 3, 1953, United Shoe Workers of America, Local 122, herein called the Union, filed with the National Labor Relations Board, herein called the Board, charges against the above-named Respondents (herein called California and Trina, when referred to individually) of violation of Section 8 (a) (1), (3), and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Thereafter the Union filed three amended charges against Trina. On July 9, 1953, the Acting Regional Director for the Twenty-First Region of the Board, on behalf of the General Counsel for the Board, on the basis of the foregoing charges, issued an order consolidating the cases and a consolidated complaint both of which were served on the respec-

tive parties. The complaint alleged that each of the Respondents had, on specified dates, refused to bargain with the Union upon request, had discriminatorily discharged Anna C. Cherry, on April 2, 1953, Ruby Lee Walker on April 6, 1953, and Jack Rosenthal, on April 28, 1953; had interrogated employees concerning their union membership and activities and had engaged in surveillance of the Union.

The Respondents filed separate answers on August 3, 1953, denying the commission of the alleged unfair labor practices and pleading affirmatively that the Board was estopped because this proceeding had the purpose and effect of enforcing a labor contract, that the Union was currently prosecuting an action in a state court to enforce a provision of the California statutes which constituted an encroachment upon and usurpation of Federal power as expressed in the Act, that the General Counsel had been requested to protect the Respondents against such state court action but that he had refused to do so.

On August 27, 1953, the General Counsel moved to strike the affirmative portion of the answers and on August 28, 1953, Trial Examiner Wallace E. Royster, duly designated to rule on the motion, granted it.

On September 30, 1953, the Regional Director, on behalf of the General Counsel, issued an amended consolidated complaint, which did not alter the substance of the unfair labor practices previously al-

leged but, *inter alia*, added allegations of additional violations of Section 8 (a) (1) of the Act, viz., that the Respondents delivered an anti-union speech on about March 15, 1953, followed by a refusal to permit the Union to reply thereto under similar circumstances, and by making promises of wage increases and threats of retaliation.

On October 12, 1953, said Regional Director issued an amendment to the amended consolidated complaint in which it added an allegation that on about February 1, 1953, and again on about February 9, 1953, the Respondents and each of them failed and refused to employ Blanche Roark¹ to discourage membership in the Union.

Pursuant to notice, a hearing was opened at Los Angeles, California, on October 13, 1953, by William E. Spencer, as duly designated Trial Examiner. At the hearing on that date, counsel for the Respondents moved for a reconsideration of the ruling of Trial Examiner Royster striking the affirmative defense in the Respondents' answers. After hearing argument, Trial Examiner Spencer reaffirmed the ruling of Trial Examiner Royster. The Respondents then moved to quash three subpoenas which had been issued. The motion was denied, but the Respondents refused to comply with the subpoenas. To give the General Counsel time to enforce the sub-

¹Spelled Roarke in the complaint, but amended on motion granted at the hearing.

poenas, the case was adjourned.² At the reconvened hearing, on November 5, 1953, counsel announced compliance with the subpoenas. The hearing was further adjourned to November 10, 1953, at which time the case was reassigned to the undersigned Trial Examiner. The hearing thereafter proceeded on various dates to and including, November 25, 1953.

At the hearing on November 10, 1953, the General Counsel moved to strike from the amended consolidated complaint the name of Ruby Lee Walker as a discriminatee. The motion was granted with prejudice. On the same day the Respondents stated on the record their answers to the amended consolidated complaint and the amendment thereto, specifically denying the alleged unfair labor practices and certain other allegations. At the close of the General Counsel's case-in-chief on November 23, 1953, the Respondents made motions to dismiss the complaint with respect to Roark, Cherry, and Rosenthal, a motion to dismiss as to the refusal to bargain, and a motion to reconsider the ruling, previously mentioned, of Trial Examiner Royster. All were denied. At the close of the hearing on November 25, 1953, the Respondent repeated the same motions. Ruling thereon was reserved. Oral argu-

²The transcript shows an adjournment to October 20, 1953, and no exhibit is in evidence to show a further adjournment, but I take official notice of a telegram in the official files of the Board, dated October 19, 1953, continuing the hearing from October 20 to November 5, 1953.

excess of \$25,000 directly to points outside the State of California. The exact character of California's operations during the major part of 1953 is in dispute, but for the purposes of a finding on jurisdiction, it is undisputed that, during a substantial portion of the year 1953, Trina Shoe Company, a California corporation (during 1953 located in Venice, an area in Los Angeles, California), manufactured footwear which it delivered to California who, in turn, resold the said footwear at wholesale and retail. During the first 10 months of 1953, the value of the footwear manufactured and delivered by Trina to California and thereafter shipped directly in interstate commerce by California to points outside the State of California, exceeded \$50,000. Although the Respondents in their answers deny that they are engaged in commerce within the meaning of the Act, I find that they are so engaged.

II. The Labor Organization Involved

United Shoe Workers of America, Local 122, is a labor organization admitting to membership employees of the Respondents.

III. The Unfair Labor Practices

A. The Refusal to Bargain

1. The Union's Status at California and the Theory of the General Counsel

On August 20, 1951, the Union was certified by the Board as representative of the employees of California in an appropriate unit of production em-

ployees. On September 27, 1952, California executed a collective bargaining agreement with the Union effective for one year from October 1, 1952, to September 30, 1953, but automatically renewing from year to year unless either party gave notice of termination 60 days or more before the terminal date or its anniversary. California operated under this agreement until about the end of February, 1953, at which time it claimed that it had discontinued manufacturing and that it no longer had production employees to whom the agreement was applicable. It is the General Counsel's position that this claim was based on a subterfuge, that California actually continued manufacturing under a factitious arrangement with Trina, and that Trina was either California's alter ego or its successor. He contends, however, that, even if Trina is an independent contractor, Trina improperly refused to bargain upon request after a showing by the Union of its majority.

2. The Business and Operations of the Respective Respondents in 1952

For some time before the incidents here involved, California engaged in its manufacturing business at rented premises on Los Angeles Street, in the city of Los Angeles, hereinafter referred to as the Los Angeles plant. Albert Lewis, son of the Respondent Jack Lewis (hereinafter referred to as Lewis, while Albert Lewis will be referred to as Albert) was an employee of California at its Los Angeles plant, and

during his last few months at that location he was a salaried employee and nonmember of the Union. Trina was incorporated in 1948 as a California corporation.⁴ All of its stock was held by Maurice Fellman and his wife, who were, respectively, president and secretary-treasurer. Its directors were Fellman, his wife, and his sister. Before the latter part of 1952, Trina was engaged in the manufacture of footwear with its own machinery and equipment at Costa Mesa, California, a small town in Orange County, the county adjoining Los Angeles County to the south. Trina had never been organized by a union. California's partners never owned any stock in Trina nor held any position therein as officers or directors. Lewis had been acquainted with Fellman since about 1946 and had visited Fellman's plant in 1947.

3. Employment of Fellman by California and Subsequent Agreements

Because of a shortage of operating capital, Trina suspended operations before October, 1952, and on about October 1, 1952, Lewis hired Fellman at \$80 per week as a patternmaker to make sample shoes. Fellman continued in California's employ until the end of December, 1952. During the first month of his employment by California, Fellman, in spare time, manufactured at his Costa Mesa plant by himself a small order of shoes for California (150 to

⁴Fellman had operated as a proprietor before the incorporation.

200 pairs) which he delivered to California and which the latter found satisfactory.

California's Los Angeles lease was due to expire in February, 1953. Its lessor, who was asking an increase in rent from \$288 to about \$342 per month, turned down Lewis' offer of \$300. Because of this and because of poor health and advice of his doctor to "take it easy" as much as possible, Lewis, who lived in Santa Monica, decided to locate the plant closer to his home. During the first week in November, California gave its specifications to realtors, and within 2 weeks the Venice location was found. On November 24, 1952, California signed a lease for the Venice plant with one Kate Salisbury as lessor for a term of 5 years beginning January 1, 1953, at a rental of \$275 per month for the first 2 years and \$300 per month for the next 3 years.

In the month of December, 1952, according to Fellman, he suggested to one of the partners of California that Trina manufacture shoes for California, because "there were several things that indicated there was a possibility that they might even go so far as to discontinue manufacturing completely," such as Lewis' health and the running out of California's lease.⁵ I infer that his proposal was

⁵Fellman, called early in the hearing as a witness by the General Counsel, testified that he first broached this subject about 2 weeks before he moved at the end of December. Later, when called as a witness by the Respondents, he testified that he first brought up the subject early in December. Lewis testified that the discussions were going on

to do the manufacturing at the Venice plant. He testified that there was no reason why he could not have manufactured shoes for California at his Costa Mesa plant but that it would not have been agreeable to all parties because California wanted an arrangement whereby it could have closer inspection of the work. Fellman informed Lewis of his financial obligations and told him that, to make it possible for him to do any manufacturing for California, Lewis would have to advance money to discharge his debts. As a result of the discussions, Trina and California executed an agreement to buy and sell footwear and a sublease by California to Trina of the Venice premises.

As evidenced by the first document which was dated January 2, 1953, Trina agreed to sell and California to buy all the footwear required by the buyer in its merchandising operations during the calendar year 1953. The buyer was given the right to inspect both finished articles and work in process on the seller's premises. The price of the footwear, made according to the buyer's specifications and subject to its approval, was to be fixed by written agreement for each style of shoe, slipper, or other footwear before the seller entered on production, with a

about the time that he was looking for a new location in November. He admitted, however, that he had full intention of leasing space in the Venice area regardless of whether or not he ever made arrangements with Fellman. I find that the discussions took place after California had signed its new lease.

provision for arbitration in the event of a failure to agree on the price. The buyer agreed to furnish technical advice and assistance, for which a reasonable allowance was to be made in fixing prices, and a reasonable allowance was also to be made "in the event that" the buyer furnished to the seller the use of the buyer's machinery and equipment. The agreement further provided for payment, within 30 day, for goods delivered, but with provision that the buyer might set-off the amount of any invoice against any amount owing from the seller to the buyer. The last two clauses of the agreement negated relationship other than of buyer and seller⁶ and prohibited assignment of the contract by the seller although permitting assignment by the buyer within certain limitations.

The sublease, dated January 1, 1953, was for the same 5-year term as the Salisbury lease to California with the same rent as provided in that lease. The sublease described the premises covered as the building demised by the Salisbury lease but excepted "the front storeroom, the rear office room, and the front office room." However, the sublessee, Trina, was given joint use of the front office room with California.

⁶This clause reads: "It is specifically understood and agreed that Seller is acting hereunder as a vendor and that no relationship of principal and agent, master and servant, manufacturer and sub-manufacturer, jobber and contractor, partnership, or joint venture is intended or shall exist between the parties hereto."

Fellman, although objecting to the amount of rent called for in the sublease, signed the document, but from the start Trina was actually charged with only \$200 on account of rent.

4. Financial Dealings Between California and Trina

Lewis advanced various amounts necessary to pay Trina's creditors, including the amount of a note to a bank which was secured by a chattel mortgage of Trina's machinery and equipment. On March 21, 1953, Fellman and Trina signed a promissory note in the amount of \$3,500 payable on demand to California and at the same time executed a chattel mortgage of Trina's machinery and equipment as security for the payment thereof to cover the various amounts advanced by Lewis to pay Trina's pre-existing debts.

Trina moved its machinery and equipment from Costa Mesa to Venice in late December, 1952. Lewis notified the trucking company that moved Trina's equipment and the cost of moving Trina was billed to California, who, in turn, billed it to Trina. After the lease at the Los Angeles plant ran out in February, 1953, California moved its machinery and equipment to the Venice plant. Some of this included machines which California was leasing from other companies under noncancelable leases. Although California continued to pay the lessors therefor, it billed Trina for the rent thus paid. As one or

two leases expired, the machinery was returned to the lessors, but other machines, on which leases had not expired, were kept at the Venice plant. It does not appear that Trina either required the use of California's machinery or requested that it be moved to Venice. In fact, it was admitted that there was some duplication and that a good many machines were idle because of duplication, principally in the leased equipment. The "reasonable allowance" which the Trina-California sales agreement called for in the event that California furnished Trina the use of California's equipment was never fixed as a separate figure. Nor was any attempt made to fix the value of technical advice and assistance which California agreed to furnish. Lewis testified that these items were taken into account in the price of the footwear which California bought from Trina. Fellman testified that when he entered into the arrangement with California he expected little or no profit. The evidence indicates that Lewis would ask Fellman what it would cost to make a particular shoe and that Fellman would give an estimate based on cost. Fellman testified that he did not figure cost and then add a percentage for profit because "it would be a smaller item than anticipated profit," that "if you brought it down to percentage it might be two, one, or perhaps even less in percentage." The fixing of prices apparently was not done by written agreement as agreed in the sales contract. From all the evidence I infer that neither party to the agreement expected Trina to

receive a credit for more than the shoes manufactured actually cost.

With the exception of the amount involved in the Chattel mortgage note, financial transactions between Trina and California were handled on a book-keeping basis. California kept an account for money expended on behalf of Trina, one for money advanced to Trina for payroll and operating expenses, and one showing credit for finished footwear. California, itself, paid for all purchases of leather and supplies, rental of machinery, etc., billing Trina therefor. From January 10, 1953, to September 30, 1953, California had advanced to Trina's account at weekly intervals for payroll and operating expenses, the total sum of \$43,750. At the hearing on November 23, 1953, Lewis gave it as his opinion that if the contract between California and Trina were terminated at that time their accounts would just about even up. At the reopened hearing in January, 1954, Lewis testified that the arrangement with Trina was severed as of January 1 and that Trina still owed California money for merchandise billed.

Since January 3, 1953, Trina made a few miscellaneous sales of leather and bindings to persons other than to California. There is no evidence as to whether these items had been owned by Trina before the execution of the sales agreement with California or whether it represented something acquired afterwards. With this exception, Trina made no sales to anyone except California and received no funds from anyone except from California.

5. Description of the Plant

The building housing the Venice plant has a frontage of about 80 feet. On one side of the facade is a vehicular entrance. In the center is a double door leading into a display room used by California which covers about half of the frontage. On the other side of the facade is a single door leading into a smaller room occupied as joint offices by California and Trina. Behind the display room, but reached through the joint office, is California's office. In back of the joint office passage is the shop, the front part of which is used by California for its stock. Behind that is the factory.

Above the windows of the display room and joint office is a large painted sign bearing the name, "California Footwear Co." This sign appeared as early as March, 1953. On the single street door to the joint office appear the following on four separate lines, reading from top to bottom: "Lewis of California, Trina Shoe Co., Office, California Footwear Co."

Trina had no telephone listing but California had a telephone listing at the Venice address. In the yellow book (classified advertising telephone directory) California had a listing at the Venice address with the words: "Calif. Footwear Co., mfrs. of slippers, sandals and casuals."⁷

⁷The Respondent offered evidence that it is a common practice in the trade for wholesalers to describe themselves as manufacturers. In view of this, I have given the evidence of the yellow book listing no independent weight but have considered it only as part of the entire picture.

6. Employment, Rates of Pay, Payroll and Personnel Practices

In operations at Venice, Fellman, as president of Trina, drew \$80 per week, the same amount he had received as a patternmaker at California. Among the first employees hired by Trina at Venice was Albert Lewis, son of Respondent Jack Lewis. At first, Albert received less than Fellman, but before the hearing on November 10, Albert had received an increase in salary to an amount in excess of that received by Fellman.⁸ Fellman described Albert's position as "principally in the supervisory capacity," but with no title, and "principally in the cutting room, but not solely." One or two cutters were employed at the Venice plant. In response to the question whether or not Albert directed the work of the cutters and others in the cutting room, Fellman replied, "At times." Other evidence indicates that Albert usually laid out the material to be cut by the cutters, but there is no evidence that he actually gave directions. Asked whether Albert had other supervisory duties, Fellman replied that he had and that they would be any duties that "I might see fit to assign to him." There is some evidence that Albert occasionally interviewed applicants for employment.

⁸Eugene Piasek testified without contradiction that when Albert got a raise from \$75 to \$90, Fellman complained about it in a conversation with him (Piasek) saying that he was supposed to be president of Trina and was getting \$80 on which he had to support a wife and two children, and because Albert got married he got a raise to \$90.

The evidence is in conflict as to the part played by Lewis, Levitan, and Fellman in hiring, laying off, or discharging production employees for Trina. Testimony of those three tend to create a picture that Fellman always made the decisions with regard to hiring, laying off, and discharging, with Lewis and Levitan merely lending him an occasional helping hand in interviewing applicants for employment and performing ministerial acts on Fellman's instructions. However, the evidence as a whole convinces me and I find that both Lewis and Levitan exercised more authority than that. Fellman, early in the hearing, testified that he did all the hiring initially and that he did not believe he had consulted either Lewis or Levitan about hiring either generally or with reference to individuals. Later in the hearing, although remembering no specific conversation with Lewis, Fellman testified that he had told Lewis, presumably before Trina moved to the new plant, that there were certain employees at California, who, if available, he would like to have at Venice, and he named four employees whom he thought to be skilled workers. He did not remember Lewis' answer, but he later employed two of those whom he had named. There is cause to believe that Lewis may have vetoed Fellman's selection of the other two. Lewis testified that he had never hired any production employees at Trina "directly" and that Fellman made the decision to hire, but he testified that he did interview quite a few applicants and then would send them to Fellman "to get all

the information or instructions or whatever he has to offer." The evidence indicates that, in setting up at Venice, Fellman did, at times, interview and put employees on the payroll. But Lewis told Jack Rosenthal, when the latter was discussing the prospect of employment in December, 1952, that initially all the employees hired by Trina would be sent there by him and that Rosenthal would be the first clicker operator hired. Rosenthal was hired by Trina.

After California moved to Venice, Lewis and Levitan were active in hiring some employees for Trina. Fellman testified that Levitan might have hired production workers when Fellman had made it known that he was looking for someone to hire and that he did not remember if Levitan had hired anyone before consulting him. Lewis testified that he had had a conversation with Fellman "being that I was more acquainted with the type of work and the type of manufacturing that was going on in this place here, I would more or less be able to judge from the conversation of the interview, or from the experience of the applicant, whether they would fit in with the type of operation or not, and whatever information I obtained I turned it over to Mr. Fellman."

Anna Cherry testified credibly that she went into the office about March 1, 1953, and asked Lewis, who was sitting there, about a job; that Lewis told her to wait; that he went into the plant and sent Levitan out; that Levitan told her he could use her and

that she should return at noon. She returned at that time and was put to work.

Charlotte Parker and Ethaline Smith, responding to a help-wanted advertisement, went to the plant and spoke to an office girl who called Levitan out. Levitan told Parker to come to work in the morning, and when she returned he put her to work. About May 18, 1953, Levitan telephoned Smith, who went to the plant, and Levitan put her to work. Smith testified that Levitan laid her off about 2 weeks later and that toward the last of October he called her back and she worked for 3 days.⁹ Parker

⁹Asked if he had recalled Ethaline Smith to work 3 weeks earlier, Levitan testified: "I never did. The true facts of this case was as follows, she came in with another girl and I had work for—to the other girl, I said, I haven't got work. Because she worked for us much longer, she worked for Trina longer, so Mr. Fellman told me, he says, when you need somebody you put on this one." On cross-examination Fellman denied that he told Levitan in the last 3 weeks that he could hire anybody, but he testified that Levitan might have done so on instructions from Albert. Asked if he had laid Smith off, Levitan testified: "So far as the laying off, if Mr. Fellman would tell me, I would lay somebody off. If he would not tell me I wouldn't. In other words, I was just acting on behalf of Mr. Fellman, not on my authority." I do not credit the testimony that any such formality existed. In fact at about the time of Smith's last layoff, Fellman was beginning to pull out of the Venice plant. He had set up another plant for someone in Culver City, moved some of his machinery there, and had put in an average of 30 hours a week there.

testified that Levitan laid her off in about June, 1953, and later called her back to work.

Lois Murray testified that in April, 1953, she went to the plant and talked to Levitan and Albert; that Levitan told her he did not need her right then but that he would call her in 3 days. When he did not call her, she returned anyway and Lewis hired her. Lewis laid her off in August, and, about 2 weeks before testifying, she called Lewis and asked if she could have her job. Lewis told her he had plenty of work and to come back. She returned but was laid off the same day.¹⁰

The provisions of California's collective bargaining agreement with the Union were not given effect at Trina in Venice. Trina's Costa Mesa personnel practices were continued at the Venice plant. In general Trina's policies were less beneficial to employees than the provisions of the union contract.¹¹

¹⁰The foregoing instances are representative of the part played by Lewis and Levitan in hiring and termination of employees. Additional evidence could be recited but it is not deemed essential to do so at this point.

¹¹The record contains a comparison between the provisions of California's union agreement and Trina's practices with respect to minimum hiring rates and other pay practices, including reporting-in pay, overtime pay, pro rata vacation pay, and holiday pay. Mention will be made hereinafter of the health and welfare plan instituted by Trina at Venice.

Trina at Venice paid its employees by check signed by Fellman. It was Lewis' practice, however, to pick up piecework tickets and compute the amount due. Eugene Piasek, a cutter on piece rate, testified without contradiction that he sometimes found errors in the amount of his check and that he would go to Lewis to have them corrected. On one occasion Piasek went to see Lewis about an error and, as Lewis was not there, he told Fellman that his check was short. Fellman replied that he could do nothing about it, that Piasek would have to wait for Lewis. Piasek took the check to Lewis the following week and Lewis checked and found an error. Piasek received the amount due him in his next paycheck.

On Saturday, October 31, 1953, Piasek went to the plant to get his paycheck for the preceding week. When Fellman did not come in by noon, Lewis told Piasek he would give him a check, and he made out and delivered to Piasek a California paycheck signed by Lewis and Levitan in the amount of \$60, payable to cash. The following week, Lewis brought the Trina paycheck to Piasek, who endorsed it and returned it to Lewis, receiving in cash the small difference between the \$60 and the amount of his Trina paycheck.

Piasek testified that for one week in 1953 the entire Venice plant was on a piecework basis;¹² that following that period Fellman spoke to him

¹²Certain operations were on a piecework basis throughout the period covered by the complaint.

at his machine and told him that he (Fellman) had suggested to Lewis that the shoes could be made cheaper if everyone were on piecework and that Lewis said, "O.K., we will make a try," but that at the end of the week Lewis had called Fellman into the office and expressed criticism of the piecework compensation and it was abandoned. Fellman, when asked on direct examination for the Respondents if he ever said anything of that nature to Piasek, seemed confused but finally denied it.¹³

It was not denied that there was a time when piece rates applied to all production employees. I am not satisfied that Fellman was clear as to what he was denying, and I find that a conversation such as Piasek testified to actually occurred. However, inasmuch as the testimony was hearsay as to what Lewis said, I am not finding that Lewis actually made the statements attributed to him. The evidence is related here rather to show a form of admission by Fellman that he was not completely

¹³"Q. (By Respondents' Counsel): Now, Piasek still talking, testified that you told him once that you had recommended to Jack Lewis that a piece-rate system be adopted and that Jack Lewis said O.K. Did you ever say anything of that nature either in those words or in substance or effect to Piasek?

"A. Things are very vague. It again couldn't have happened unless it's piecework, we are referring now to the cutting room?

"Q. I am saying what the star witness, Piasek, said. That is all I know. Look, all I am asking is did it happen?

"A. No."

autonomous. Fellman at one point testified that he did not consult Lewis about individual increases but that he might consult with Lewis or other parties for the purpose of determining a rate.

With respect to supervision of the employees' work, the evidence tends to establish that Lewis and Levitan in addition to Fellman, did the supervising. Except for one instance when Albert Lewis spoke to Piasek about whether or not he had performed work assigned and about a mistake which someone had made in marking sizes, the evidence shows little or no supervision by Albert. The Respondents argue that, because California was buying the finished shoes, Lewis and Levitan were merely exercising their privilege of inspecting the work in all stages in process so that there would be fewer rejects. If Fellman had continued his Costa Mesa operations and if Levitan and Lewis had confined themselves to watching and to reporting to Fellman anything wrong which they noticed, there might be more to the Respondents' argument. However, the preponderance of the evidence indicates not only that Fellman was required to move his factory to premises leased by California so that Lewis and Levitan would have closer inspection but it also indicates that Lewis and Levitan in fact exercised managerial authority beyond a mere inspection.¹⁴ A number of employees testified that they had received instruc-

¹⁴To the extent that the testimony of Lewis, Levitan, and Fellman conflicts with the findings herein, I do not credit it.

tion from both Levitan and Lewis. In some instances they testified that Fellman also occasionally gave them instructions; others testified that Fellman never gave them instructions.

The Respondents were careful to point out that Fellman did not object to the admitted fact that Lewis and Levitan had instructed employees, showing them how to perform their work. Fellman testified, without giving any specific example, that he objected "where there might have been a showing that I would find contrary to my wishes * * *" and that then the operation was performed as he wanted it done. Other evidence leads me to believe that this was likely to occur only where Fellman's experience in a particular operation was concededly greater than that of Lewis or Levitan. Levitan testified that he would not show an employee how to perform an operation on a machine, "* * * I would in most of the cases, I would send over Mr. Fellman because I am not an operator and he is." But if he saw a worker holding scissors upside down he would "show them instead of going to tell Mr. Fellman to go see what this girl is doing or what that girl is doing." Levitan admitted that he gave orders to an employee named Cherry. He explained: "We were packing, the Trina Shoe Company was packing for us a shoe that Mr. Fellman never knew a thing about and still doesn't know about it which he openly admits. It was straps. The shoes that he manufactured were a vamp shoe

* * * This shoe is made up of straps and he had never had any experience in it and so he would tell me to go over and show her how to operate the machine and so I did." In view of Levitan's testimony that he would not show an employee how to perform an operation on a machine because he was not an operator, but would send Fellman to do so because he was an operator, I do not credit his testimony that Fellman would ask him to show Cherry how to operate the machine. Cherry testified that Levitan usually came around and told her what to do but "sometimes Joe Levitan say, 'I know what I want you to do, but I don't know how it is done.' So he get Mr. Fellman and bring Mr. Fellman and Mr. Fellman show me how he want it done."

Another instance of the exercise of managerial authority by Levitan is evidenced by the fact that he told Piasek and Rosenthal, cutters on a piece-work basis, who occasionally worked on Saturday, which was not a regular work day, that they were not to punch their timecards when they worked on Saturdays or overtime.

In October, 1953, Fellman gave notice to Lewis that he did not wish to renew the Trina-California contract when it expired at the end of the year and requested that he be released from the remaining 4 years of the term of the sublease. Lewis agreed to the request. Lewis testified that there had been a discussion also about taking Albert into the Cali-

fornia partnership if Fellman did not renew the contract. In his testimony on November 23, 1953, Lewis said that a decision had been reached for California to "go on to do manufacturing on our own until we find somebody that will be able to take it over, take it off our hands." At the reopened hearing, Lewis testified that the arrangement with Trina had come to an end as of January 1, 1954, but the plant was not then operating. California expected to continue, however, either on its own or through an arrangement similar to the one it had had with Fellman.

Shortly after Fellman notified Lewis of his intent not to renew (around November 1, 1953), he moved two of Trina's clicker machines and certain miscellaneous equipment from the Venice plant to a location in Culver City and from that time Fellman averaged about 30 hours a week at the latter location. At about the same time he ceased to draw his \$80-a-week salary from Trina. He testified that he still spent some of his time at the Venice plant. Aside from signing checks, he performed no apparent managerial functions after November 1, 1953. Fellman testified that in most instances he had signed the payroll checks after they had been made out but that he had left signed a blank check or two to cover an emergency when he was not available. He further testified that he had not interviewed anyone for employment following that time but had "checked over everything" that had happened. The evidence, including his own testi-

mony, indicates that he was not, however, familiar with all that had happened. For example, when Fellman was first called as a witness on the General Counsel's case, he testified that some new employees were hired while he was away and he did not know who did the hiring but that he had given authority to Albert and Levitan to hire. He testified that Albert was in charge during the time he was away but that "in a general sense" Levitan was in charge in that Levitan had assured him he would keep things going. Later when Fellman was being cross-examined as a witness for the respondents, he testified that he had given Albert express authority in advance to hire certain help that was needed and that he had not given Levitan authority to hire, "but it is possible he might have done it through instructions from Albert." Levitan testified that in that period he had put on employees for short terms at Fellman's instructions. Albert Lewis testified that, in the sense of making the decision to employ someone, neither he nor Levitan nor Lewis did any hiring. He testified that in that period he had interviewed a few girls that came in for jobs; that he had written down all the information and passed it along to Fellman, and that they were not hired until Fellman had specifically approved their names. Albert did not give any names.

Martin Zell, who had been a foreman at another shoe plant, was hired by Trina about mid-October, 1953. Fellman testified that he hired him after consultation with Lewis and then terminated Zell's

employ in about a month. He also testified that he had hired Zell with the intention of using him in the lasting room but that he did no work other than cutting, that Zell did not receive a salary while cutting but was on an hourly rate, and that Zell had only one period of employment. Fellman apparently did not know when he testified on November 24, 1953, that Zell had served as a cutter for his first 2 weeks and then had been given an \$85 per week salary, but during the reopened hearing in January, 1954, Fellman appears to have learned more about Zell's compensation, testifying that Zell was paid piece rate while cutting and that Zell's pay had been established at \$85 per week about his third pay check. At the hearing in November, Fellman furthermore apparently did not know that Zell had been recalled to work and had worked for the 4 days before Fellman gave the foregoing testimony. Likewise, Fellman could not explain the \$60 advance to Piasek. About the first week in November, Levitan told Zell in Piasek's presence, according to the latter, that Fellman "isn't here any more."

The evidence as a whole leads to the conclusion that the arrangement between California and Trina was not an ordinary bona fide sales contract. Rather, I conclude, that the legal documents were designed to give an outward appearance of a type of relationship which did not exist in fact. In reality, the effect of the arrangement was that Fellman lent his corporate structure to California for the sake of appearance but occupied, himself, a position akin

to that of foreman for California. His functions in supervision, hiring, laying off and discharging were no more than might have been performed as a foreman. His signing of payroll checks was a necessary formality to continue the appearance of a separate business. But Trina operated without profit and with no funds of its own. By advancing funds for Trina's weekly payroll, California was in a position to dictate how much should be paid for each employee, including Fellman and Albert Lewis. It is inconceivable that a president and stockholder of an independent corporation, expecting no profit, would set a salary for Albert Lewis, for the type of services which he performed, larger than he set for himself. Not only am I convinced that Fellman, in reality, was no more than a foreman for California but I am convinced and find that even that relationship ended no later than November 1, 1953, when Fellman ceased to draw his salary as president and spent most of his time elsewhere.

7. Conclusions Respecting the Employer Status of California and Trina

The preponderance of the credible evidence convincingly establishes that Trina lacked that degree of independence essential to denominate it as an independent contractor. California's being the sole source of Trina's operating capital, its control over payroll funds, its active participation in hiring and termination of employees, its active participation in supervision of manufacturing operations, its selection and leasing of the manufacturing site, and the

use of its machinery and equipment among other things, combine to identify California as the dominant party in the relationship.¹⁵ Even if the Respondents' explanation of the conduct of Lewis and Levitan in directing, supervising, hiring and terminating employees were accepted and they were merely acting as agents for Trina at Fellman's request, they would come within the statutory definition of "employer," which includes "any person acting as an agent of an employer, directly or indirectly." However, looking through form to the underlying substance of the relationship, I am convinced and find that, despite the language of legal documents and the superficial formalities followed by the Respondents, California was, during 1953, in reality the principal and Trina was its alter ego or agent. As such, they were jointly and severally responsible for the unfair labor practices, hereinafter found, during the term of this relationship.

8. Circumstances of Refusal to Bargain

As previously stated, the Union had a collective bargaining agreement with California commencing on October 1, 1952. This agreement could be terminated by either party on proper notice on September 30 of succeeding years.

¹⁵Denton's, Inc., 83 NLRB 35; Manhattan Shirt Company, 84 NLRB 100; Walter Holm & Co., 87 NLRB 1169; The Whiting Lumber Company, 97 NLRB 165; National Garment Company, 69 NLRB 1208, enf'd 166 F. 2d 233 (C.A. 8), rehearing den. 166 F. 2d 239, cert. den. 334 U.S. 845.

Early in the year 1953, Ernest Tutt, organizer for the Union, heard rumors that California was going to shut down and that another shop was going to open in Venice. As a result, he went to California's Los Angeles plant and asked Lewis if there was any truth in these rumors. Lewis said that the shop was going to close down and he was going out of business. Tutt asked why, and Lewis explained that he was doing this on advice of his doctor to take it as easy as possible because he had an incurable spinal disease. Tutt asked if Lewis' decision had anything to do with the Union or the contract or anything connected with the Union. Lewis replied that it did not, that it was based on doctor's orders, that he could no longer stand the strain and aggravation of running a shoe factory. Tutt then asked about the Venice factory. Lewis told Tutt that it was one that was going to be operated by Fellman. At Tutt's request, Lewis gave him the address of the new plant. Tutt told Lewis that he was anxious to have as many California employees as possible employed at the Venice plant. Lewis responded that he had nothing to do with hiring or running the Venice plant and that Tutt would have to speak with Fellman about that. Tutt asked Lewis if he had any idea of what Fellman's reaction would be toward continuing the union contract.¹⁶ Lewis

¹⁶The contract contained a provision that it was to be binding on successors and assigns, but that when the successor or assign had agreed to be bound by the contract, California's liability thereunder would cease.

replied that he did not and that Tutt would have to talk to Fellman about that.

The agreement between California and the Union included provisions for a union shop and checkoff of dues. California continued to check off dues of employees at its Los Angeles plant until it moved to Venice. The last dues remittance by California was for February, 1953, dues for ten employees.¹⁷

On January 27, 1953, Tutt, accompanied by the Union's business agent, went to the Venice plant. At that time the plant was just being set up and there were not more than five employees working. Tutt presented to Fellman a copy of the agreement which the Union had with California and told him that the Union was anxious to continue the agreement. Fellman suggested that they return later to discuss the matter. On February 9, they returned and asked Fellman if he had been able to look at the contract. Fellman said he had and he asked a few questions about the agreement and commented that things at the shop were in a raw state and that they were not producing many shoes. Tutt pressed Fellman for a reply as to whether or not he would be willing to continue or reinstate the California-Union contract. Fellman promised to telephone the

¹⁷The letter of remittance was dated February 11, 1953, but was on California's letterhead bearing the Venice address. The record does not fix the exact day when California ceased operations at its Los Angeles location. California had checked off dues for seventeen employees in January.

Union by February 13 and give his answer. He did not do so, however.

On February 19, 1953, the Union's attorney wrote a joint letter to California and Trina, stating that it was the Union's position that Trina was actually California and that the California-Union contract continued to be binding on Trina; that if the Respondents took the position that they were not the same, the contract was, by its terms, binding upon California's successor, and that until the successor agreed to be bound, California remained liable under the contract. The final paragraph of the letter read:

This letter shall also serve as formal notice upon you that regardless of what position is taken by the Company as to the existence of a union contract, all the employees engaged at the old job at 253 South Los Angeles, Los Angeles, California, request employment on jobs which they are capable of performing at the first time that the job becomes available. You may reach the employees involved either by notifying the Union or notifying the employee direct.

A reply to this letter was sent to the Union's attorney by Richard Perkins, as attorney for California, on March 19. In the reply, he described Trina as an independent enterprise and said that it was not a successor. He stated that he was informed that when Trina Shoe Company commenced operations it offered employment to those who had

worked at California although it was not obligated to do so.¹⁸

In the meantime, on March 18, Tutt and Knapp went to the Venice plant with a prepared letter, addressed to the Union, reading:

Our company agrees to recognize your Union as exclusive collective bargaining agent for all of our production employees, effective immediately, providing you show us sufficient pledge and dues cards that you represent a majority of our production employees.

Tutt presented this to Fellman and asked that he sign it. Fellman read it and asked if it was legal for him to sign it. Tutt assured him that it was; so Fellman signed it as president of Trina. Tutt said that the Union would be in a position to negotiate a contract with him as soon as they could prove that it represented a majority of the production employees.

On March 23, Tutt returned to the plant with Frank Roth, a member of the Union's executive board. Tutt asked Fellman for a list of production employees to see if the Union had a majority. Fellman showed Tutt the time cards and Tutt copied the names of the employees from them.

On about March 23, at 4:30 p.m., Fellman called a meeting of employees, attended by Fellman, Albert

¹⁸The nature and extent of this offer will be mentioned later herein.

and Jack Lewis, and Levitan.¹⁹ All the employees were assembled at the front of the shop. Fellman testified that his reason for calling the meeting was that the Union had distributed a leaflet which quoted the March 18 agreement which he had signed and which made untrue representations with respect to wage rates and other benefits at Trina and certain other plants. Fellman spoke to the employees for about 20 minutes, discussing these representations and giving his version of the facts.²⁰ He called attention to the wage provisions of the union

¹⁹According to the testimony of Linda Murray, Fellman at this meeting mentioned the fact that Tutt had shown him the pledge cards. If this is a fact, the meeting would have occurred on the evening of March 24. But according to former employee Gertrude Small, she was present at this meeting. Small testified that she quit on an undetermined date. Her name was not on the list of employees on the Trina payroll for March 24. Thus, she would not have heard the speech on the latter date. I find therefore that the meeting was called no later than March 23 and it may have been as early as March 19.

²⁰As I find that this portion of Fellman's speech did not exceed the permissible limits of free speech, I do not detail all that he said. Linda Murray, a witness for the General Counsel, quoted Fellman as saying he called the employees together because the union man had been out and "had showed him some names of some of us who signed up for the union." I believe that Murray was mistaken that Fellman made the quoted statement at this time, because I have found that Tutt had not yet shown Fellman the cards at the time of this meeting.

contract which Tutt had left with him and which Fellman had posted nearby along with a typewritten statement prepared by him on Trina letterhead. (See Appendix A attached hereto.) At the close of his speech, Fellman told the employees to attend the union meetings but to use good judgment before signing pledge cards and to verify the Union's representations of fact. Following Fellman's speech, Lewis spoke with a few of the employees who had gathered around and explained to them the new hospitalization plan that was going into effect. He testified that he knew Fellman's plan was similar to one which California had had in the Los Angeles plant because "I found that out from the insurance agents that came around from different insurance companies and they brought in briefs, and from discussions they had with the girl in the office as to how this plan worked." Linda Murray testified that "before we all went back to the machines, we started drifting one by one, looking at the pamphlets that was put up, and Mr. Fellman had asked if we wanted the union in there and no one said anything and then he asked * * * if there was anyone that didn't want the union and no one said anything, until finally another girl that worked at the California Footwear, Hazel Smith, I believe her name was, stepped up and said she didn't want the union * * * and then Mr. Lewis said he couldn't see where it would benefit us any and that we each had our jobs and as we improved ourselves we would get a raise, but there was 16 or 18 others wanting in there."

Murray testified, "That is all he said, 16 or 18 others wanting in there. He didn't say they were going to hire them * * *" Gertrude Small quoted Lewis as saying that "there was between 16 or 18 people waiting for our jobs any time." Lewis and other witnesses for the Respondents emphatically denied that Lewis made a statement about 16 people waiting for jobs if the crew then working for Trina did not like theirs. Small's memory did not appear to be very accurate. Furthermore, she testified that she left early before the meeting was over. Although Murray's memory seemed better than Small's, I am not convinced that her testimony was accurate in all details. In view of the negative evidence and my doubt as to the complete accuracy of the affirmative testimony, I do not find that Lewis made a threatening statement about 16 or 18 waiting to get in. On April 17 the Union, having heard about Fellman's speech, wrote a letter to the Respondents demanding an opportunity for the Union to address the employees at the shop under conditions similar to those prevailing when Fellman spoke to them. The complaint alleged that the failure of the Respondents to grant the request was a violation of Section 8 (a) (1) of the Act, but under the more recent pronouncements of the Board I find no violation.²¹

On the following day, March 24, Tutt again returned with Knapp, presented to Fellman, in the

²¹Livingston Shirt Corporation, 107 NLRB No. 109; Cooper's, Inc., 107 NLRB No. 206; Detergents, Inc., 107 NLRB No. 281.

office, a prepared letter of recognition which listed the names of 31 employees and the names of 17 of these for whom the Union had 12 pledge and 5 dues cards; and handed Fellman the pledge and dues cards. According to evidence offered at the hearing, there were 27 production employees on March 24. Four of the dues cards were those of employees who had worked at California's Los Angeles plant. Two of the latter cards, those of Jesus Estrada and Herlinda Hernandez, bore date stamps indicating dues paid through February; one, that of Annie Bell Stamps, bore a date stamp for dues paid through January; and that of Charles Quesenberry, although bearing a date stamp for dues paid through February, had a penned date for March dues and a penciled notation "See Ernie." The fifth dues card, that of Louis Oster, who had not worked for California, bore date stamps indicating payment of February and March dues on March 14. On this card, above the date, in a space where payment of the \$1.00 death benefit payment was customarily shown, was the penciled word "free." Fellman looked through the cards, withdrawing that of Stamps. Then he excused himself and went back into the factory. Fellman testified that, in looking at the cards, he noticed what he called "discrepancies," that, in the factory, he went to Quesenberry, asked if he had paid his dues and was a paid-up member, and got a negative reply; that he asked Quesenberry if the same was true of Hernandez, with whom Quesenberry was friendly, and that Quesenberry said it was. Fellman testified that the

“discrepancy” which he noticed on Quesenberry’s card was that dues were shown to be paid for March, although there was no checkoff of dues at Trina and the checkoff would have stopped with February. He admitted that he suspected how Quesenberry stood in the Union before he questioned him. Returning to the office, Fellman told Tutt that he would not recognize the dues cards. After a brief argument, Tutt and Knapp left.

On March 31 Tutt and Roth returned to the Venice plant, told Fellman that the Union thought it now had a majority of the employees who had signed pledge cards and that the Union would not rely on dues cards. He asked Fellman how many employees there were at that time and Fellman replied facetiously that there were 1624 employees. Tutt again asked and received the same reply. He reminded Fellman that he had signed an agreement to recognize the Union if it showed that it represented a majority of the employees and asked if Fellman intended to carry out that agreement. Fellman replied, according to Tutt, “No, I don’t like your antagonistic attitude when I met with you last week.” Fellman testified that he refused recognition because he felt that there should be an election. There is no evidence that he so stated at this time. On March 31, there were 28 production employees on the payroll. Of these, 12 had signed authorization cards. Two or three employees who had signed cards and who were on the payroll on

March 24 were not on the payroll on March 31.²² Although Tutt had with him the union authorization cards relied on, he did not, in view of Fellman's refusal to recognize the Union on authorization cards, offer them to Fellman. However, he offered Fellman a letter, similar to the one he had delivered on March 24, listing the names of 15 employees from whom the Union had received pledge cards signed on or before March 30. The evidence does not indicate that Fellman looked at the letter, and Tutt did not leave it with him.

Following the filing of the charges in this case, a meeting was arranged by a state conciliator for April 7. At 10 a.m. that day, Tutt and Fellman met with the conciliator in the latter's office. After discussing the cases of two discharged employees, they discussed the subject of the union contract. Fellman suggested an election, but was told that an election could not be held because of the pendency of charges filed by the Union. At noon, at the conciliator's suggestion, Tutt and Fellman had lunch together. At this time Fellman raised two objec-

²²One card was signed by Isabel Rodriguez. There was a Mabel Rodriguez on the payroll, but not an Isabel. It does not appear whether or not they are the same person. Gearline Kelly and Lonie Mae Brown, for whom the Union claimed cards, were not on the March 31 payroll. Brown was not shown on the earlier payroll, either. Although her card was dated March 30, it was excluded from evidence. As my findings do not depend on proof of cards or dues, I have not considered the effect of discrimination against Roark in computing the total.

tions to the contract, first, that he did not wish to sign the contract which was under the name of California, and second, that he believed the seniority clause would prevent a shifting of employees from one job to another. Tutt assured him that the name would be changed to Trina and that the seniority clause would not have the effect of prohibiting a shift of employees. When they returned to the conciliator's office, Tutt said that he understood that Fellman's two objections had been met and that he saw no reason why a contract could not be signed. Fellman said that he had other objections to the contract. When asked what they were, Fellman answered that he would have to study the contract. The meeting ended without agreement. Presumably this was the last meeting concerning the subject of collective bargaining.

9. Conclusions on the Refusal to Bargain.

The Respondents do not contest the appropriateness of a unit of production employees for the employer who employs them. The real contest is on the question of who the employer is. If California is the real employer at the Venice plant, there is a refusal to bargain, the General Counsel contends, in California's failure and refusal to give effect to the existing union contract after the move to Venice (thereby repudiating the contract), in the refusal of California to discuss with the Union the transfer of California employees to the Venice plant, and in the fact that unilateral changes in wage rates and other conditions of employment were made by

the use of Trina's employment conditions instead of those under the union contract. Although denying that it was an employer after the move to the Trina plant, California contends that, in any event, the union contract was illegal because it contained a clause reading:

“Apprentices or inexperienced workers with less than 3 months' experience in the shoe industry shall secure work permits from the Union within two weeks of their hiring and shall become members of the Union after 30 days of employment.”

The General Counsel contends that illegality of the quoted clause would have no effect on California's obligations under the contract because the contract contained a separability clause and because the Union had not sought to enforce the clause, had so notified the Respondents, and had, in a letter dated July 14, 1953, proposed to delete the clause in question.²³

²³The contract also contained a clause requiring all employees to become members of the Union after 30 days from the date of their employment with no mention of a grace period for old employees. One statement made by Respondents' counsel leads me to believe that he was not attacking the legality of this clause. To avoid any misunderstanding, however, I find that this clause would be valid under the decision of the Board in *Krause Milling Co.*, 97 NLRB 536. Although the record contains no express reference to a union shop contract before the October 1, 1952, agreement, I note that the Union was certified on August 20, 1951, and in

California did not rely upon the illegality of the contract in discontinuing dealings with the Union in the early part of 1953. Rather it took the position that it no longer had production workers in its employ to whom the contract would apply. Had California raised objection to the illegal clause, the Union might sooner have assented to its elimination. The illegal clause was not essential to the effectiveness of the agreement as a whole and can be eliminated without affecting the remainder of the contract. By the separability clause, the parties themselves expressed their intention to continue the remainder of the agreement in the event that any clause should be determined to be invalid. Such intention was not unlawful.²⁴ I therefore conclude that California was not relieved of its obligations under the contract by virtue of illegality of the above-quoted clause.

As I have found that California continued to be an employer even after the move to Venice, the only

Respondents' examination of the witness, Ray Peiffer, it was brought out that he had been employed by California for a few days in the summer or spring of 1952, that he was not then a member of the Union, but that he knew that, if he had continued in California's employ, he would have had to join the Union. I infer that the Union had a union shop contract with California before the one here involved. In the letter of July 14 above referred to, the Union proposed an amendment to the language of this clause.

²⁴N.L.R.B. v. Rockaway News Supply Co., 345 U.S. 71.

question to be decided is whether or not what it did constituted a refusal to bargain. Section 8 (d) of the Act contains a proviso that “where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof * * *” and complies with certain other requirements. On all the evidence in the case it appears, and I find, that California took fortuitous advantage of its expedient removal of its plant to new leased quarters and resorted to a subterfuge in setting up Trina as a “front” for itself in order to disregard its contract with the Union and to alter the wages and working conditions from those called for by its contract with the Union. Whether or not this was a breach of contract, it was a refusal to bargain within the meaning of Section 8 (a) (5), (1), and 8 (d) of the Act.²⁵

I also find that the respondent California refused to bargain collectively with the Union when the Union sought to discuss the transfer of employees from the Los Angeles plant to the Venice plant. Lewis avoided his statutory obligation to bargain

²⁵See *Eva-Ray Dress Manufacturing Company, Inc.*, 88 NLRB 361; *John W. Bolton & Sons, Inc.*, 91 NLRB 989.

about this subject by pretending that California was discontinuing manufacturing and had nothing to do with employment of production employees. If the Union failed to represent a majority of the employees at Venice, that situation could be directly traced to the fact that Lewis had refused to discuss and evaded the request in the matter of transferring employees. From evidence hereafter related, it is even inferable that the Respondents intentionally failed to invite all of California's Los Angeles employees to Venice because of a desire to destroy the Union's majority and to maintain a non-union shop. Because Trina was, as I have found, an alter ego or an agent for California, Trina was, within the scope of that agency, bound by its principal's obligation to recognize the Union and its contract. Its refusal to do so constituted a refusal to bargain within the meaning of Section 8 (a) (5) of the Act. I do not interpret the Union's conduct in attempting to prove to Trina its majority by authorization cards to be a waiver of its right to recognition on the basis of its original certification and extant contract with California. Although the Union suspected that Trina was a front for California, it could not be sure of that until the matter had been fully investigated; so it was justified in following a course based on alternative suppositions.

B. Interference, Restraint and Coercion

Conflicts in testimony were numerous. There were no witnesses on either side that could be called

strictly disinterested, but witnesses had varying degrees of interest or bias. Memories varied. In some instances witnesses testified more positively than their memories would seem to warrant. In others, especially with Lewis and Fellman, I received the impression that they should have remembered some things which they testified they had forgotten. In resolving conflicts, I have taken into account the apparent keenness of memories, the possibilities of misunderstanding of spoken words, consistency of testimony within itself, consistency of testimony with other testimony and with known facts, disposition of a witness to depart from the truth, his interest or bias, the conduct of the witness while testifying, and many other factors.

Gertrude Small, who worked at the Trina plant for a few weeks before March 24, 1953, testified that on an occasion when she was working as a packer, the date of which was not fixed, Lewis and Fellman were talking to two women applicants for employment at the end of her workbench, which was "quite a ways from the office"; that Lewis told the women that the Union "wanted to come in there and did they want to join the union, and it seems that the way he was putting it that, well, the union was no good—something"; that one of the women said she belonged to the Union before, and would like to belong to the Union, and did not want to work if there was going to be trouble about the Union; that Fellman said, "Well, we are trying not to have the Union in here"; that the woman said

she wanted to belong to the Union; that she (Small) left before the conversation was finished and that when she returned, the women were gone and she did not thereafter see them. Lewis testified that he remembered no such conversation and Fellman denied that he was present at any such interview. Small's memory in some respects did not appear to be too accurate. Because of this, because of the denials, and because I am skeptical that such blunt statements would be made openly next to an employee whose attitude toward the Union was not known, I do not find that such conversation took place.

Charlotte Parker was employed at Trina about April 6, 1953. About 2 weeks later Lewis asked her if anyone had asked her to join the Union. She replied in the negative, and Lewis remarked that there were some girls in the plant trying to get something started and that there were always a few of those in every plant.

Lois Murray was hired by Lewis at the Venice plant on about April 15. In her second week there Lewis called her to the office and asked her how she liked her job and then asked if she had joined the Union. She said she had not, and Lewis then told her not to because she would be out a lot of money paying union dues. Murray testified, and I find, that she was laid off by Levitan in August and she was recalled by Lewis about 2 weeks before she testified, that Lewis at that time asked her if she had joined the Union and she answered that she had but did not know what it was about when she joined,

that Lewis asked her who had given her the slip to sign (i.e., the pledge or authorization for the Union) and she answered that she did not remember because it was when she had first come to work (in April), and that Lewis remarked it was only someone trying to be smart.²⁶

On about March 31 or April 1, Fellman asked employee Anna Cherry what she thought of the Union and then said that it would not do anything for the employees and would close the shop down.

Eugene Piasek, whose discharge is related hereinafter, applied for work and was interviewed by Fellman and Lewis on April 3, 1953. After Fellman had asked Piasek a few questions about his identity, who sent him, and where he had worked before, Lewis asked Piasek if he was a union member. Piasek answered that he had been but falsely explained that he had had an argument with the union business agent and had been "kicked out" of the Union and that this was the reason he had left his prior job. Lewis then told Piasek to come back the next day for a try-out.²⁷

²⁶On cross-examination by Respondents' counsel, Murray testified that she was laid off the same day.

²⁷Fellman testified that he did not believe that Piasek was asked if he belonged to the Union; but Fellman could not even remember if Lewis was present at the interview. Lewis testified that there was no reason to ask if Piasek was a union member because Piasek said that he had worked at Ted Saval's, and it was generally known that Saval's

Piasek testified, and I find, that in May, 1953, in a conversation he had at his machine with Albert, Jack Lewis' son, no one else being present, he asked Albert, if it would not be better to belong to the Union than to run away from it, and that Albert replied in the negative, adding, "The first year we belonged to the Union we lost \$10,000." Piasek testified that he then asked what they would do if the Union caught up with them "over here" and that Albert replied that they would move to another city.²⁸

was a union shop; but when asked directly if he or Fellman had put such a question to Piasek, Lewis answered that he could not remember. Both Fellman and Lewis recalled that Piasek had offered an explanation of some trouble he had had with the Union. It is extremely improbable that Piasek would have given an explanation, especially a false one, of his standing with the Union if he had not had the question of his union membership put to him. Because of this and my observation of the manner in which the witnesses gave their testimony about this, I have credited Piasek's version.

²⁸This testimony was taken subject to proof that the Respondents were responsible for Albert's statements. Although Albert's supervisory authority was not great, I find that he had some. But especially because Albert was the son of Jack Lewis and received a higher salary than Trina's president, I find that in the minds of the employees Albert was closely associated with management and that the Respondents were responsible for such utterances as he may be found to have made. *Mansback Metal Company*, 104 NLRB No. 95; *R & J Underwear Co., Inc.*, 101 NLRB 299.

Jack Rosenthal also testified to a conversation with Albert at which no one else was present. On March 25, the day after Tutt had shown Fellman the list of names of employees claimed by the Union to constitute its majority, according to Rosenthal, Albert said to him at his machine that Fellman had seen the list as presented by Tutt and that "little by little those names would be let out." Albert denied having made this statement in substance or effect. Rosenthal's name was not on the list since he had not signed an authorization until later. However, if such a threat had in fact been made, I doubt that Rosenthal, who did not appear to be exceptionally aggressive, would have held the threat so lightly as to sign an application blank on the very next day as he did. Because of this and in view of Rosenthal's interest as an alleged discriminatee at the time he gave his testimony and the completeness and positiveness of Albert's denial in this instance, I credit the denial.

On April 14, 1953, after working hours, the Union held a meeting in a house on Main Street in Venice located about a mile south of the location of the plant. Between 5 and 5:15 p.m. that evening, Lewis was sitting in his parked car almost across the street from the meeting place. Piasek parked his car at the curb a few cars behind Lewis' car, got out on the sidewalk side and walked forward toward the next pedestrian cross-walk. Up to this point, the testimony of Piasek and Lewis coincide. Piasek testified that as he came along the sidewalk opposite

Lewis' car, he recognized it and saw Lewis, alone in the car, lean toward his right side in a manner to conceal his face; that he (Piasek) continued to the cross-walk, crossed the street and stood on the sidewalk with a few others, calling their attention to Lewis, who was then sitting upright looking in their direction. Lewis admitted that he was at the spot testified to by Piasek, but testified that he did not know there was a union meeting scheduled there, and explained his presence there by relating that a friend of his named Friedman had come from Passaic, New Jersey, to visit him; that Friedman asked what the rental situation was, thinking he might move his plant to the West Coast; that Lewis drove Friedman around to see if they could see any signs of vacancies but consulted no realtors; that after a while he parked on Main Street in Venice near a bus stop and talked with Friedman while waiting for the next bus to take Friedman back to his hotel; that Piasek passed on the sidewalk and stopped to talk for 5 or 6 minutes; that Piasek asked what Lewis was doing there; that Lewis explained he was waiting "for this man to grab a bus," that he asked Piasek what he was doing there and that Piasek answered that he was going to a union meeting. According to Piasek's version, he did not speak with Lewis when he saw him near the union meeting place, but the next day at the factory Lewis said to him, "I thought you told me you were not a union member," to which Piasek testified he replied, "I am not. I went to see what is going on over there." Lewis denied the

last part of Piasek's testimony. It is odd that in passing Lewis' car, Piasek, who was apparently on friendly terms with Lewis would not stop to speak or would stand on the opposite side of the street looking at Lewis, who was looking in his direction, without giving some sign of recognition. Lewis' testimony of the manner in which Piasek stopped and spoke with him was given with a lack of restraint or effort that made it sound natural. I find that Piasek did speak to Lewis on the street and I find that if Lewis said, "I thought you told me you were not a union member," he made the statement at this time rather than the next day. On the other hand, there are elements of Lewis' testimony and his explanation of his presence there which make it difficult to believe that his being there was pure coincidence. I am not convinced that Friedman was with Lewis at this time. As I understand the evidence, the Venice plant was close to the Santa Monica line.²⁹ The route of the bus which Lewis testified his friend was waiting for ran on Main Street into Santa Monica, in which town Lewis had his home. Therefore, the bus would have passed the Venice plant and would have come closer to Lewis' home than the corner near which Lewis testified he had stopped to wait for a bus. This being the case, it would appear to have been more logical for Lewis to put his friend, if he were there, on a bus

²⁹I have taken official notice of a map of Los Angeles which tends to bear this out as the smaller numbered streets are to the north.

near the plant, if Lewis had intended to return there that evening, or to put his friend on the bus in Santa Monica, if Lewis had intended to go home after dropping the friend. A day or two before the meeting, the Union had handed out leaflets to employees at the plant, announcing the time and place of the meeting. The Respondents saw other union leaflets and could have seen this one, too. But regardless of this, I find the circumstances of his being there too much of a coincidence to believe that he was ignorant of the fact that a meeting was being held there. Even if Friedman was with Lewis that evening, I find that Lewis took advantage of the occasion to stop near the union meeting place for the purpose of surveillance.

Jack Rosenthal, one of the alleged discriminatees, testified that he attended a union meeting on March 26, 1953, at which Tutt asked if threatening remarks had been made to anyone there; that he told Tutt there had been to him;³⁰ that the next day at his machine Fellman asked him about the meeting and Rosenthal said there were not more than a dozen people there, and that Fellman then said that there were eleven people at the meeting—nine from

³⁰This presumably had reference to a conversation which he had had a couple of days before the meeting in which Fellman told Rosenthal, according to the latter, "If I were you, I wouldn't go to that meeting," and when Rosenthal asked why not, Fellman replied, "You might be breaking bread with Jack Lewis some day." I do not find these quoted statements to be coercive.

the shop and two spies. Fellman, without hesitation, flatly denied that the conversation or any part of it had taken place. Although Fellman's testimony was shaded in the direction of the Respondents' interests, he did not appear to me to be inclined to make an unqualified positive denial in an instance where his memory was unimpaired and where he understood the question. Fellman may, in some instances, have given a negative answer to certain questions, where a part of the question could have been answered affirmatively, and where he did not offer to separate the true from the false, but the question here was both as to the whole conversation and any part of it, and Fellman denied both. Fellman did not deny that he had spoken with Rosenthal about union meetings, and although I am satisfied that Fellman may have spoken with Rosenthal on March 27 about the meeting, I do not find that he made the statement as quoted by Rosenthal. If there had been two spies at the meeting, they would have reported to Fellman that Rosenthal had volunteered that threatening remarks had been made to him and that Rosenthal signed a union application. But it does not sound logical that Fellman, knowing this, would confide to Rosenthal that there were spies there unless Fellman was trying to inspire fear. This did not appear in keeping with Fellman's nature.

Piasek testified that he attended the May 12 union meeting, this time going in by the back way instead of by the front, and that the next day Fell-

man came to him as he was working and said, "I thought you were not a union man, and you went last night to the union meeting," and that he said to Fellman "This is a free country, and if I want to go to a union meeting, I will." Fellman testified that he recalled no such conversation, that something along that line could have happened but not as phrased in the question, and not the next day after a union meeting because he did not believe he would have known of it. Fellman also testified that he knew from some source that Piasek was attending union meetings and that the subject "was never covered up between the two of us." I find that Fellman talked to Piasek about the union meeting which Piasek attended but not in the words quoted by Piasek, and I find no violation of the Act on this incident.

Linda Murray testified that on the day that Tutt brought the authorization cards out to show them to Fellman, which she placed on the same day as Fellman's speech to the employees, she called Fellman over to work on her machine, that Fellman then told her, in the presence of an employee named Aldea Callahan, that he was mad at Murray. When Murray asked why, Fellman replied, according to her testimony, that he did not trust anybody any more and asked why she had signed that union card. When Murray, in a surprised or questioning tone of voice said, "I signed the union card,"³¹

³¹The finding about Murray's tone of voice is based on my observation of her testimony. It does not appear in the record.

Fellman said, according to Murray, "Yes; you did, I know all of them that signed it," and turning to Callahan, Fellman said, "You did, too." Murray testified that Callahan asked Fellman how he knew and that he replied that the union man had been out and had said so. Murray testified that Fellman, a moment later, said, "I know where that rumor came from, now," referring to a rumor in the plant that Lewis was going to fire anyone that joined the Union. Murray testified that she asked where and that Fellman replied it came from Rosenthal. Murray testified that she denied this and said that the rumor came from "the other room." Murray then testified that Fellman asked her if she knew "they could shut the shop down," and that she replied, "Well, that way it wouldn't make no money for nobody." Murray further testified that Fellman spoke to employee Alice Dupuis and asked her why she signed a card; that Dupuis asked, "Jack Lewis can't fire me, can he?" and that Fellman had asked, "Who said he was going to fire anyone?" Fellman was unable to recall the conversations testified to by Murray but admitted that he might have told Murray he had seen some union cards. I find that Fellman made the statements substantially as testified to by Murray, but I find that the incidents occurred on March 24 and not on the same day as Fellman's speech.

On the basis of the foregoing facts, I find that the Respondents interfered with, restrained, and coerced the employees in the exercise of the rights

guaranteed in the Act by the following conduct: Lewis' questioning of Parker, Lois Murray, and Piasek about their union membership or application for membership; Lewis' surveillance of employees attending the April 14 union meeting; Fellman's questioning of Linda Murray, Callahan, and Dupuis about their reasons for signing union pledge cards; and Fellman's questioning of Cherry about her attitude toward the Union. Because it is not clear from Linda Murray's testimony to whom Fellman was referring by the pronoun "they" in his statement that "they could shut the shop down" and because it could have referred to the Union equally as much as to the Respondents and apparently did in his remark to Cherry, I do not base a finding of coercion on this testimony. I do find Fellman's alleged anti-union speech or the Respondents' refusal to give the Union an opportunity to reply under similar circumstances constituted a violation of Section 8 (a) (1) of the Act. The only evidence of a promise of wage increase was Lewis' reference, after Fellman's speech, to the practice of giving 5 cent increases as an employee's work warranted. The Respondents' unilateral changes in wage and working conditions were part of the refusal to bargain, and, like all violations of Section 8 (a) (5), are a violation of Section 8 (a) (1) of the Act.

C. The Discriminations

1. Blanche Roark

Blanche Roark had been employed by California from 1950 to the time it ceased manufacturing operations on Los Angeles Street early in 1953. For her first year, Roark was employed as a sock stitcher and after that as a platform stitcher. During 1952 and until California moved, in about February, 1953, Roark was chief shop steward for the Union. In late December of 1952, Roark, having heard rumors concerning the plant that was to be set up at Venice, made inquiries of Fellman. Fellman told her maybe he could use her later on.

On Thursday, February 5, 1953, Roark went to the Venice plant with Tutt and with Ruth and Ed Morris, two former California employees. The testimony of Roark and Fellman differed to some extent regarding their conversation at that time. It is not clear how much of the conversation between Fellman and Roark may have been overheard by Tutt or the Morrisises. Tutt was not asked about the incident and the Morrisises did not testify. According to Roark, she first asked Levitan if she could have her job back and Levitan referred her to Fellman, who told her that he could probably use her later on and that he would call her on Saturday morning and let her know when she could go to work. Roark testified that when Fellman did not call her, she telephoned him on Saturday and he told her he could not use her then but would call her later. In this conversation, Roark testified, the subject of her

transportation was mentioned and she told him she would make arrangements for it. Fellman never called her. Fellman testified that when Roark came in with Tutt she asked if he had a job for her and he said he did; that she asked when she could come to work and he gave her a specified date;³² that Roark, who had to travel about 12 miles to the Venice plant, then became "evasive" and uncertain about transportation and left the matter of employment undecided. Fellman testified that Roark telephoned him later about employment and that he told her he did not then have anything for her but "might possibly know something more definite by Saturday," and if he did he would call her. Roark's testimony appeared to be given frankly and her demeanor on the witness stand impressed me favorably. Fellman's memory was so hazy about **certain** conversations with other people that I am not convinced it was clear in this instance. Furthermore, there were indications in his own testimony that he was not certain that he told Roark when to come to work. On the basis of my observation of the witnesses, I credit Roark's version and find that before Roark received the telegraphic offer of employment, hereinafter mentioned, she was not offered employment at the Venice plant.

³²On cross-examination counsel for the General Counsel asked: "In your direct testimony you told us a little bit more. You said you told her when to come to work, is that correct?" Fellman answered, "That is, yes, very possible." Later he testified that he told her the day she could come to work, but that he could not recall what day he gave her.

Fellman testified that, before starting at the Venice plant, he told Lewis that there were certain employees of California, who, if available, he would like to have at the Venice plant, and he named Blanche Roark, Ed Morris, Charles Quesenberry, Herlinda Hernandez, and Jesus Estrada. He further testified he personally asked Quesenberry to come to Venice and probably asked Quesenberry with regard to Hernandez because they were "very close." Apparently those were the only two he personally invited, but he did, on application, hire Estrada and an employee named Annie Stamps. Fellman had not told Lewis that Stamps was one of the employees he would like to have. None of the four last-named employees (Quesenberry, Hernandez, Estrada, and Stamps) signed union authorization cards or paid dues after dues ceased to be deducted under the checkoff provisions of the union contract. Subsequently the four were suspended by the Union for nonpayment of dues.³³

At the time when Roark talked to Fellman at the Venice plant, early in February, an employee named Louis Oster was working about half the time on platform stitching and about half on sock stitching. Oster had never worked at California before. He had been a foreman at one shop, Kay's and before his employment at Trina, in the last of January or

³³Late in March, 1953, the Union wrote letters to these four threatening discipline and asking them to appear at a union meeting on April 1. They did not appear.

first of February, 1953, he had been laid off at Casual's of West Los Angeles, a union shop where he was required to be a union member. However, in February, Tutt named Oster a steward and gave him credit as such for dues, and Oster signed a union authorization card between March 24 and 31. Linda Murray, an employee hired by Trina in January, 1953, was doing similar work on a type of slipper that did not require as much skill. Fellman testified that when Roark applied in person for work in early February, he intended to use her to replace Murray or Oster, but that, by the time she telephoned him later, Oster had gone on platform stitching exclusively, had developed his speed on that, and to transfer him then to sock stitching, on which he would have been slower, would have adversely affected his piecework earnings, which Oster probably would not have tolerated. After Oster went exclusively on platform stitching, various operators were used on the sock-stitching operation at different times. Only one platform stitcher and one sock stitcher was needed full time throughout the year. Early in November, 1953, after Roark's name had been added to the complaint, Trina sent Roark a telegram, offering her employment. She telephoned in reply, and Fellman told her the rate which Trina was then paying for platform-stitching work. The piece rate was the same as she had been receiving at California but did not include the cost-of-living bonus which California had paid. Roark, then having other employment, declined the offer. At this time, Oster was still employed; it does not

appear what Fellman intended to do with him if Roark had accepted the offer. At no time did Fellman offer Roark a job as sock stitcher, but he testified that he did not know that she had had any experience except as a platform stitcher, and Roark did not ask for any work except as a platform stitcher.

From the type and length of Roark's employment at California and from the fact that Fellman mentioned her to Lewis as one of the employees he would like to have at the Venice plant, I infer that she was a skilled and competent worker. Since I have found that Trina was not an independent employer but was under the control of California, Lewis was in a position to, and did in many instances, pass on the employment of certain employees. If Fellman had not been influenced by Lewis, I am satisfied that he would have offered employment to all of the employees that he told Lewis he would like to hire, including Roark, and that he would have made sure of Roark's retention by making a definite arrangement with her before her work at the Los Angeles Street plant ended. His failure to do so and his vague answers to her inquiries about employment indicate an intention not to employ Roark but an avoidance of a direct refusal to employ her. If there was work available for Roark when she visited the Venice plant on February 5, as Fellman admitted, I am not persuaded that the situation would have changed materially before she telephoned Fellman on Saturday, February 7, even

if that were the first time that he told her he did not have a job for her. In 2 days' time Oster would not have become so much more proficient in platform stitching that he could not have been transferred to sock stitching. And presumably the difficulty of assigning Oster to other work did not deter Fellman from offering Roark a job in November, by which time Oster certainly would have developed speed on platform stitching. On all the evidence, I conclude that the Respondents refused employment to Roark on February 5, 1953, although work was available.

The General Counsel contends that the real reason for refusing to employ Roark was a discriminatory one, to discourage union membership. The Respondents may argue that any appearance of discrimination is dispelled by the fact that they employed many union members; that sock stitching was done throughout by a member of the Union;³⁴ that Oster, who did the platform stitching, was a union member. As Oster had been a foreman at Kay's and as such a nonunion man, and as Casual's had a union shop where there would be no choice of not being a member, the Respondents would not necessarily think of Oster as a union advocate when employing him. At least four employees (Quesenberry, Hernandez, Estrada, and Stamps) who had

³⁴It was so stipulated. As there were several employees who performed this operation at different times, I take the stipulation to mean that each was a member or at least an applicant for membership in the Union.

been union members at California's Los Angeles Street plant under a union shop contract exhibited their preference not to be members at the Venice plant where the union shop agreement was not given effect; so quite evidently union membership at a union shop would not convince the Respondents that it proved a disposition to advocate the Union at a nonunion shop. As for the union members who did sock stitching, with one exception, it does not appear how long each remained in employment, how active they may have been on behalf of the Union,^{34a} or whether or not the Respondents were aware of their attitude toward the Union when they were employed. Linda Murray was one employee who had done that work, but for what period of time it is not shown. From Fellman's remarks to her, it appears that he had not known her attitude toward the Union before Tutt showed him the names of union applicants on March 24, although she had then been employed for more than 2 months. From the mere fact that there were union members employed at the Venice plant, therefore, I cannot infer a disposition on the Respondents' part either to be favorable to them or to be indifferent. The record is replete with evidence that the Respondents were disposed to maintain a nonunion shop. This is evident from the very subterfuge employed by

^{34a}Roark, as chief shop steward at the Los Angeles plant, would have been known by the Respondents as one of the most prominent and active union members.

California in setting up Trina as apparent employer while retaining substantial control, and thereafter discontinued application of the union contract; from the extensive questioning of employees and applicants for employment about their union membership, applications, or views; from Fellman's speech on March 23; from the fact that, when Tutt sought recognition for the Union on March 24, Fellman, evidently knowing the attitude of certain employees toward the Union, refused recognition on the basis of prior dues payments and, when the Union made a new claim on March 31, without relying on dues payments, Fellman, without assigning any bona fide reason, and without examining the Union's cards, refused recognition; from Lewis' surveillance and from innumerable other indications to be found in the record. On all the evidence, I conclude and find that the Respondents refused to employ Roark on February 5, 1953, because of her union membership and activity, thereby discouraging membership in the Union. But in view of the fact that the Respondents failed to offer Roark employment at the Venice plant before her work ended at the Los Angeles Street plant and the fact that California refused to discuss with the Union the matter of transfer of employees to the new plant, I also find that it was California's intent to terminate Roark's employment permanently at the time when the plant was moved and when Roark was given no more work, and that this resulted from California's desire to escape the obligation of its contract with the Union. Thus,

Roark was the object of discrimination at the end of her employment at the Los Angeles Street plant on about January 30, 1953, as well as on February 5, 1953.

2. Anna C. Cherry

Anna Cherry was employed by Levitan for work at the Venice plant at noon on Monday, March 2, 1953, at 75 cents per hour, and until the last week of her employment she was used principally on strap cutting and "spaghetti" cutting. Spaghetti is a thin piping, the cutting of which required no special skill. Cherry was started on spaghetti cutting as training for strap cutting. About a week after Cherry was hired, Levitan informed her that she would get an increase, and she did thereafter receive a 5 cent increase to 80 cents per hour. Cherry testified that she received the increase in her second paycheck. Fellman testified that this did not sound right to him and that it sounded like a bookkeeping error. Cherry's final paycheck stub showed that she was paid at the rate of 80 cents per hour for 32 hours in each of the last 2 weeks of her employment. The other stubs did not indicate the number of hours. Her first week's pay was \$27. As she started at noon on Monday of that week, the dollar amount correctly figures at 75 cents an hour for 36 hours. Her second week's pay was \$25.60. This would be 32 hours at 80 cents. It would not compute properly at 75 cents an hour. Her third week's pay was \$32, which would figure

out at 80 cents an hour for 40 hours. On the basis of Cherry's testimony and the paycheck stubs, I find that Cherry received her increase as she testified. The record is not clear as to what the practice at the Venice plant was with respect to the first wage increase. Linda Murray did not receive a 5 cent increase for 3 months after she was hired. Fellman testified that that was not in keeping with the policy concerning raises and that normally he considered giving a raise after 30 days. It was stipulated that Trina's practice was to pay 95 cents an hour to employees with a minimum of 3 months' experience at Trina. I infer that, within a 3 months' period after hire, employees were given increases as their work appeared to merit it. In the last week of her employment Cherry was assigned to work cleaning shoes.

On March 16, Cherry signed an authorization and application card for the Union. As previously related, on about March 31, or April 1, 1953, Fellman asked Cherry what she thought of the Union. When she did not answer, Fellman said that the Union would not do anything for the employees and it could close the shop down. Cherry walked away without speaking.

On Thursday, April 2, at the end of the day, Fellman told Cherry not to report the next day saying they would have to lay her off; that they did not need her; and that there would be no more straps for a while. Cherry asked when he would call her and he replied that he would call her if

he had anything for her. Fellman testified that when he laid Cherry off he had no intention of recalling her and that he had told her there was no more work for her as "just the easiest way out of it."

Fellman testified that Cherry did satisfactory work cutting spaghetti but that she did not take to cutting straps; that she spoiled a great many straps; that other employees "complained" of her work in the sense that poor cutting would show up in any of the stitching operations; that he called her attention to it "you might say continuously" and cautioned her on her cutting every day. Fellman also testified that, later, shoes were returned because of inaccuracy on strap cutting. He did not know "whether she had cut the straps but it's very possible." Fellman had no complaint about Cherry's work on cleaning shoes.

Levitan testified that Cherry's strap cutting got so bad that Fellman took her off the job and set her to cleaning shoes. Levitan also testified that Cherry complained about being taken off strap cutting and that Fellman then showed Cherry and two other employees a basket of straps, saying, "You see this; we can't use this. You see this. We can't use this basket, either, and a little box in three, four places." Levitan denied that these were straps spoiled at the other plant. Fellman denied that Cherry had complained about working at cleaning.

Cherry testified that she was never criticised while cutting straps and never spoiled any that she

knew of. She testified that she had reworked some spoiled straps which Levitan had told her they had moved from the other plant. Linda Murray, a witness for the General Counsel, who had worked close to Cherry, testified that, after Cherry had been employed a week or two, Levitan stopped and told Cherry she was doing fine and he was going to see about getting her a nickel raise. Murray testified that Cherry was very fast and that her work was of generally good quality. On cross-examination, Murray was asked whether or not there were instances when straps that Cherry had worked on had to be done over. Murray answered, "No, sir; they come from the California Footwear * * * They weren't what she cut."

It is undisputed that strap-cutting work ran out temporarily at the time Cherry was transferred to cleaning in the last week, but Fellman testified that he would have taken Cherry off of strap cutting sooner if there had been more in sight. He also testified that Cherry was not suited to cleaning shoes and that that was why he laid her off, but he could not recall why she was unsuited. In one answer, Fellman indicated that as they could not use Cherry where he wanted to use her, there was in his judgment no place for her.

Linda Murray testified that practically all the other employees who cleaned shoes after Cherry left were union members or applicants. The girl who was used on strap cutting when it was next

done had also signed a union application card.³⁵

The Respondents' evidence concerning the excessively poor work that Cherry did on strap cutting was not convincing. I do not doubt that Cherry was responsible for some spoilage, but this was not uncommon. If Cherry had been as bad as she was portrayed, I am convinced that she would have been taken off the strap cutting job before that work ran out,³⁶ and the fact that she was given an increase so soon after she was hired is inconsistent with the criticism which was leveled at Cherry at the hearing. It is conceded, however, that Cherry was discharged at a time when she was on the job of cleaning shoes. No fault was found in her work at that job. The Respondents did not assert that there was a drop in the amount of cleaning to be done and that, consequently, one employee had to be laid off. The record does not indicate how many employees were doing that work before and after Cherry's discharge. But payroll exhibits in evidence, which were supplied by the Respondents, indicate that the names of four employees who were on the payroll on March 24 were not on the payroll on March 31 and that four new names appear on the payroll on the latter date.

³⁵This was Ruth Seaton, whose card bears the date of January 3.

³⁶Such evidence as appears in the record indicates that the Respondents carefully watched and guarded against waste. It would have been contrary to their nature to keep on a job an employee who was causing excessive waste as they kept Cherry on until strap-cutting ran out.

This would indicate an equal replacement. However, Cherry's name, as one of the four, was omitted from the exhibit purporting to show the payroll on March 31 although she actually was not discharged until April 2.³⁷ Taking this error into account, I note that on March 31 there were only three old employees gone, while there were four new employees. The record does not reveal to what jobs the new employees were assigned, but as there was no strap cutting at that time it was not for that job. And apparently it was not for one of the more skilled jobs since the skilled workers identified were still there. Cherry would appear to have been as competent as any of the new employees on nonskilled work.

The proximity of time between Fellman's questioning of Cherry about her attitude toward the Union and her discharge, the currency of the question concerning representation, and the changes in the payroll, combine to create a strong suspicion that the Respondents hired new employees and discharged Cherry in order to prevent the Union from getting a majority. But to carry the evidence beyond the realm of suspicion to proof it would be necessary to show that the new employees were still on the payroll on April 2 and that Cherry was replaced at the cleaning job by a new employee. This does

³⁷Can it be that the Respondents actually believed that Cherry had been terminated at the conclusion of her work on strap cutting and that that explains why they came prepared with a ground for discharging her from that job, but had no explanation for her discharge from the cleaning job?

not appear. So far as appears, no one replaced Cherry at cleaning. It is just as possible to infer that Cherry was discharged because there was no need for her services as to infer that she was discharged to keep the Union from getting a majority. The fact that Cherry was discharged rather than laid off, despite what Fellman told her, also creates some suspicion, but the evidence does not indicate that the Respondents made it a practice always to recall laid-off employees before hiring new ones, or that they never laid an employee off with intent not to recall, so the mere fact that at the time of Cherry's layoff Fellman intended not to recall her is not shown to be unusual. For want of sufficient proof, I find that Cherry was not discriminated against.

3. Jack Rosenthal

Before Jack Rosenthal was employed at the Venice plant he had a period of employment at California ending some 4 years earlier. In early December or late November, 1952, Lewis telephoned Rosenthal and asked him to return, but Rosenthal said he was satisfied with what he was doing. However, about 2 or 3 weeks later Rosenthal telephoned Lewis and asked if the job was still open. Lewis replied that it was and told Rosenthal to come down to see him. When Rosenthal got to the Los Angeles Street plant Lewis said he did not have an opening at that time but that there would be an opening at another plant near Lewis' home. Rosenthal testified that he asked Lewis, "What part of the place [the

Venice plant] do you own?" and that Lewis answered that he owned all of it. Lewis denied that Rosenthal asked or that he answered as Rosenthal testified. I am not convinced that the question or answer was phrased as Rosenthal put it, but when Lewis was assuring Rosenthal a job at another plant not far from his home, it would be the most natural reaction for Rosenthal to want to know how Lewis could give that assurance. I find that, in some form, Rosenthal asked Lewis' connection with the Venice plant and Lewis indicated that he had an interest which would enable him to speak for it. Rosenthal went to the Venice plant and talked with Fellman, who hired Rosenthal at \$1.75 an hour for the first month. After that Rosenthal was put on a piecework rate. Rosenthal testified that, after Fellman had fixed his initial rate, all later changes in rates he discussed with Lewis.

Rosenthal attended a union meeting on March 26, 1953. At the meeting, Tutt inquired whether threatening remarks had been made to anyone there and Rosenthal told Tutt that he was one to whom such a remark had been made. After the meeting that evening, Rosenthal signed a union application and authorization.

On April 6, the Respondent hired a second clicker machine operator, Eugene Piasek. Whereas Rosenthal had done some overtime work before Piasek was hired, he did none afterwards.

The material customarily cut at the Venice plant was plastics, felts, and compositions. About mid-

April, Fellman said to Rosenthal, "You haven't cut very much leather, have you?" Rosenthal said that he had cut certain types, but Fellman concluded that Piasek had had more experience on cutting leather than Rosenthal. On April 28, Rosenthal was laid off. Fellman told him to come back in 2 or 3 days and there would be work for him. Rosenthal testified that, when he was laid off, Lewis told him that there was no work for either him or Piasek. Albert Lewis told Piasek to come in at 10 a.m. on the day following Rosenthal's layoff. Piasek testified that he did so and, when he came in, Albert told him the reason he had told Piasek to come in at 10 a.m. was because "I fired Jack Rosenthal last night." Albert was not asked specifically if he had told Piasek to come in at 10 a.m. the next day or if he had explained his reason for this the next day by saying it was because "I fired Rosenthal last night."³⁸ Despite the lack of a specific denial, I am skeptical that such an explanation was made to Piasek. There is an apparent suggestion in this testimony that the Respondents were trying to deceive Rosenthal into believing that there was no work for Piasek either so that Rosenthal would not know that Piasek had been retained to cut leather while he had been laid off. But Rosenthal would not be expected to be in the day after his layoff; so he would not have seen Piasek even at 8 a.m., the customary starting time.

³⁸Counsel for the Respondents asked Albert if he had told Piasek that his father (Jack Lewis) had told him that Rosenthal was fired because of the Union.

As Fellman told Rosenthal to come back in 2 or 3 days, Rosenthal would be expected to see (and did see) Piasek working at that time. No attempt was made to conceal it. Furthermore, Piasek testified on cross-examination that Lewis brought him 150 pairs of leather material to cut the day before Rosenthal was laid off. Obviously, Rosenthal could have seen then that the leather had been given to Piasek to cut. I do not doubt that Piasek was told to come in at 10 a.m. or that he was told the next day that Rosenthal had been laid off, but I find that no connection between the two was mentioned. Piasek also testified that a day after the day that he started at 10 a.m., Lewis came over to his machine, that he asked Lewis why Rosenthal was not working any more and that Lewis said that Rosenthal "made too much trouble here, and to him [Lewis], for the union." Piasek corrected this to "made too much trouble by the union." Lewis denied that he told anyone that Rosenthal was fired for union activity. Actually Rosenthal was not particularly active in the union. I doubt that Lewis would have made a remark in the form in which Piasek put it. Piasek's testimony about the remark indicated some confusion. I find that Lewis did not make the quoted statement.

A few days after his layoff, Rosenthal returned to the plant and spoke with Fellman. Rosenthal testified that Fellman told him that all the cutting would be leather from then on and that he did not feel that Rosenthal was experienced enough to cut

leather. Fellman denied saying that all the cutting would be leather from then on. Insofar as the form of the quotation implies that there would never be more plastics to cut, I credit Fellman's denial. Rosenthal tried to argue and asked for a tryout but Fellman refused and told Rosenthal, "When we can use you, we will send for you." Fellman explained that he refused to give Rosenthal a test because he already had an experienced man (Piasek) to do the work. Fellman testified that 200 pairs of leather parts could be cut in less than a day and that there were from 2,000 to 5,000 pairs to be cut. After Rosenthal left, Piasek worked extra hours, putting in as much as 50 or 55 hours in some weeks, including work on a number of Saturdays in a 2 months' period.

In late May, Fellman sent Rosenthal a telegram asking him to return. Rosenthal went to the Venice plant in response and told Lewis and Fellman that he was "tied up right now" but would know in a few days whether the "deal" that he was working on would materialize, and he said that if it did not, he would return to work. According to Fellman's credited testimony, Rosenthal asked if the job would still be open and Fellman said that they did not contemplate putting anyone on it for the next couple of days. Three or four days later Rosenthal told Fellman that his deal fell through and he wanted to return to work. Fellman told him that they needed him 3 or 4 days before but did not need him then.

According to Fellman, work fell off for some reason in the interim. On November 23, 1953, the Respondents put Rosenthal back to work. The occasion for this is interwoven with the circumstances of the discharge of Eugene Piasek, hereinafter related.

It is apparently the General Counsel's theory that the Respondents laid Rosenthal off, intending not to recall him, because in some manner they learned that Rosenthal on March 26, had offered to the Union, at the meeting that evening, evidence about a supposed threat made by management. If this is the case, the Respondents waited a long time before giving effect to their intent, for Rosenthal was not laid off until late April. It is suggested that there was in fact work for two cutters after Rosenthal was laid off and that absent a discriminatory motive the Respondents would have employed Rosenthal. But the only evidence of the quantity of work on hand is that Piasek did overtime work after Rosenthal left whereas neither had worked overtime when he was there. But even if Piasek had worked as much as 55 hours in one week, which was his estimate of the greatest number of hours worked and which would not have been a constant figure, this is a long way from proving that there was enough business for 80 hours of work a week which would be necessary for two employees. It may be noticed that before Piasek was hired, Rosenthal had done overtime work himself, proving that the Respondents had periods when one man working somewhat

long hours was capable of handling the volume of work on hand.

The General Counsel appears to suggest that the only reason why Trina called Rosenthal back to work at the end of May, after the third amended charge, which included Rosenthal's name, had been filed, was to stop the running of back pay in the case of a discriminatory discharge. If the initial layoff was not discriminatory, the fact that the Respondents might not have offered Rosenthal employment in May but for the fact that a charge was filed cannot, *ex post facto*, convert an economic layoff into an unfair labor practice. The third amended charge mentions the fact that Rosenthal was laid off although he had more seniority than the cutter retained. Whatever obligation California had under its union contracts and regardless of the fact that failure to give consideration to seniority might be a breach of contract, that would not alone prove a discriminatory motive or a violation of Section 8 (a) (3) of the Act. On all the evidence, I find that the Respondents did not discriminate with respect to Rosenthal's hire or tenure of employment because of his union membership or activity and that Rosenthal was in fact laid off because Fellman believed Piasek to be more experienced in cutting leather.

4. Eugene Piasek

Piasek was interviewed for employment by Fellman and Lewis at the Venice plant on April 3, 1953. As previously related, Lewis asked Piasek about his

membership in the Union, and Piasek, who was a union member, falsely stated that he had had difficulties with the Union and had been expelled. Lewis told Piasek to come back the next day, Saturday, and they would see how he could cut. Piasek worked from 9:00 a.m. to 1:30 p.m. on Saturday. Then Fellman took Piasek to the office and told Lewis that Piasek was "cutting reasonable." Lewis gave Piasek the piecework rates and told him to come back on Monday, April 6.

Piasek attended two union meetings, the first on about April 14, when Lewis was parked across the street from the meeting place as related earlier herein, and the second on about May 12. According to Piasek's testimony, the Respondents were aware of his attendance at each meeting.

During a part of July or August, 1953, the Venice plant closed down. After the plant closed, at a time not disclosed by the record, Piasek got a job at another plant. Between the time of the shutdown and the month of October, Piasek returned once or twice. He returned again on about October 14 and talked to Lewis. Piasek testified that Lewis told him to quit the job he was on (Lewis denied this)³⁹ and return to work the following week. He also testified that he quit his other job as of October 16, but he made no mention of having gone to the plant on that day or on Monday, October 19. He merely testified

³⁹Lewis testified he told Piasek to keep his job "until we started up again."

that he went to the Venice plant on Friday, October 23. Meanwhile, in mid-October, Martin Zell was hired. Zell had been lasting room foreman at another shoe factory and he was hired with the idea that he might become a supervisor at the Venice plant. Zell, a laster, had had some experience on cutting, but I would judge that he was not as experienced a cutter as Piasek. When Piasek came to the Venice plant on October 23 and saw Zell working at the cutting machine, he told Fellman that Lewis had told him to quit his job but had hired another cutter. Fellman said that Zell had not been hired as a cutter but as a supervisor, and he told Piasek to see Lewis. Piasek went to Lewis and complained in the same fashion. Lewis also told Piasek that Zell had not been hired as a cutter but had been hired as a supervisor. After talking for a while, Lewis told him to wait while he went to speak to someone. According to Piasek's undenied testimony, Albert Lewis came in and said, "You see, Gene, my father didn't want to take you back but I made him take you back." Then Lewis returned and told Piasek to call the next day and he would tell him when to come to work. Piasek telephoned Lewis the next day and Lewis told him to come to work on Monday, October 26. Piasek did so and worked the full 5-day week, and the first 3 days of the following week. On Wednesday evening, November 4, Piasek was told to come in the next day as some sponge rubber was coming in to be cut. On Thursday, November 5, the day when the Respondent complied with the subpoena duces tecum in this

case, Lewis and Fellman went to the hearing. That morning at the plant, Albert told Piasek that his father had said he (Piasek) was not to do any cutting that day but would start the following Monday. Piasek did not leave immediately, and at 8:30 a.m. he saw Albert take the sponge rubber to Zell at the machine Piasek used and saw Zell start to work on it.

On Tuesday, Thursday, and Friday, November 10, 12, and 13, Piasek was in the hearing room waiting to be called to the witness stand. On Armistice Day, November 11, no hearing was held, but the plant was operating. Piasek testified that he went to the plant that day and Lewis called him into the office and asked him why he had to testify against him. Piasek testified that he replied, "Listen, Jack, you do such unfair labor practices over here * * * everybody wants to testify against you. This is the truth. * * * You told me to quit a job. I am a cutter, then you hired Martin Zell and put him on the cutting machine and you dismissed me * * * which isn't fair." He further testified that Lewis asked, "Why didn't you tell me?"; that he replied, "You're the boss, I am just the employee. I can't tell you what to do"; and that Lewis said, "I will fire him [Zell] at the end of this week." Lewis denied that there was such a conversation, that there "couldn't be any conversation to that effect because during that period when he was working there there was not a proceeding going on and he wasn't called to testify and I had no way of knowing what the

testimony would be. I couldn't tell one way or another whether he would testify for me or against me or which way. * * *'' Of course, Lewis would have known that on November 10, Piasek was in the hearing room not because he was called as a Respondents' witness, and he could have inferred that Piasek was called by the opposite side. In any event, from observing the witnesses as they gave this testimony, I find that the conversation took place substantially as testified by Piasek.

On Friday, November 13, at the hearing room, Lewis asked Piasek if he would be able to start cutting on Monday, and Piasek replied that he would if he were called to testify that day (Friday) but otherwise he would start working on Tuesday.

On Saturday, November 14, Lewis telephoned Herman Greenberg, who had been a cutter at the Los Angeles plant for 3 years until January, 1953. Lewis asked if Greenberg was working. Greenberg replied that he was and asked if Lewis had "straightened out" with the Union. Lewis answered that he expected to the next week and that then they could get together again.⁴⁰ I infer that Lewis, hav-

⁴⁰This finding is based on Greenberg's credited testimony. On the Respondents' case, Lewis denied that he had called Greenberg. He testified that Greenberg had called him about work early in 1953, but not in November, and that he had not heard from Greenberg for 5 or 6 months. But earlier, when called as a witness for the General Counsel, although denying that he had called Greenberg, he testified that in the fall of 1953 Greenberg had

ing learned that Piasek had not changed his intent to testify, was looking for a cutter to replace Piasek.

Piasek was not on the witness stand until Monday, November 16. On Tuesday, November 17, after he had given his testimony, Piasek went to the plant. When he walked through the office into the packing room he was met by Levitan who told him that they did not need him then, that if they wanted a cutter they would call him. Piasek testified that as he walked back through the office, Albert came over to him and the following conversation took place: Albert said, "Gene, my father and Joe Levitan are sore at you because you testified against him." Piasek said, "Listen, Albert, I testified the truth, didn't I? I didn't lie." Albert said, "Yes, you testified the truth but you know how my father is." Albert denied that any such conversation took place. I have no doubt that Lewis and Levitan were displeased with Piasek's testimony, but I do have some

called him. In response to the General Counsel's question as to whether Lewis, in that telephone conversation, had said, "Maybe we will get together again in a week or two and you can go to work for me," Lewis answered, "In essence it might have been, but in actual conversation did not. He just wanted to know what was doing in the plant and if we were busy and so on and so forth and did we straighten it out as far as the union was concerned, and I told him we were in the midst of the hearing right now and I couldn't very well tell him one way or another and that is all." The inconsistency in the two portions of Lewis' testimony is obvious. As Greenberg had another job, it is unlikely that he would have called Lewis at all, much less to call for the limited conversation testified to by Lewis.

doubt that Albert was so naive as to tell Piasek that, and I doubt that the conversation, if it occurred, would have been in the form testified to by Piasek. I make no finding that the conversation occurred.

On the week end of November 21, 1953, Fellman and Lewis met with Respondents' counsel at the Venice plant. As a result of the discussion they had there, Fellman, on the same day, sent a telegram to Jack Rosenthal recalling him to work.

On Monday morning, November 23, Piasek went to the Venice plant and saw Rosenthal waiting to start work. Piasek went to Levitan and berated him for not having told him the week before that he was discharging him instead of leaving him uninformed as to his status. Levitan told Piasek that he did not know anything and that he should see Fellman.

At the hearing on November 23, the General Counsel rested, and Respondents' counsel made certain motions, among them a motion to dismiss as to Rosenthal. In the course of his argument on this motion, he announced that Rosenthal had returned to work that morning, that there was work for only one cutter—Rosenthal or Piasek. It was not then specifically stated whether Piasek was discharged or laid off, but in the answer to the supplemental complaint, stated orally on the record on January 5, 1954, the Respondents denied the allegation that Piasek was discharged as alleged.

The Respondents take the position that, as the amended consolidated complaint alleged that Rosenthal was discharged discriminatorily on April 28, 1953, and as the General Counsel had not acknowledged, before November 21, nor in fact before December 4, 1953, when counsel for the General Counsel wrote a letter to Respondents' counsel⁴¹ that Rosenthal had lost his right to reinstatement after he was offered employment in the latter part of May, the Respondents were required to decide whether or not it was advisable, even though they thought Rosenthal was not discriminated against, to cut off any possibility of further back pay and, having decided, on advice of counsel, on the week

⁴¹This letter, after the opening paragraph, reads:

"In view of the fact that employee Jack Rosenthal turned down an unconditional company offer of reinstatement in May of 1953 (a fact undisputed in the record) it is the General Counsel's position that he thereby lost his right to reinstatement by reason of the alleged Section 8 (a) (3) violation. Of course, said former employee, should he apply for employment in the future, is entitled to non-discriminatory consideration as a new applicant for employment.

"We urge the companies, through you as their attorney, to immediately reinstate Eugene Piasek to the position of cutter, and invite you to participate with us in a case settlement conference at your earliest convenience. Pending such conference, and apart from it, we urge the immediate reinstatement of Eugene Piasek and, in that connection, we assure you that the General Counsel does not make, and at no time has made any claim that cutter Jack Rosenthal is entitled to reinstatement (or back-pay after date of unconditional offer) by reason of the alleged Section 8 (a) (3) discrimination."

end of November 21, that it would be advisable, they immediately recalled Rosenthal and that Rosenthal's return necessarily eliminated Piasek. On the record, I find that Respondents' counsel had, before December 4, 1953, some reason to believe that the General Counsel was not conceding that Rosenthal's right to reinstatement was cut off in May, 1953. The question to be decided is whether or not the reason given by the Respondents was the one which actually motivated them in replacing Piasek with Rosenthal. Doubt that it was arises from (1) the fact that the Respondents delayed so long in making the decision to offer reinstatement to Rosenthal, (2) the fact that Lewis and Levitan were obviously displeased with Piasek's testimony and gave him no more work after he had testified, and (3) the fact that the Respondents presumably made their decision to employ Rosenthal over the week end and quickly acted on it, knowing that the action would be viewed with suspicion, and not taking the trouble to consult with the General Counsel's representative concerning the move.⁴²

With respect to the first point—the long delay—it may be noted that the Respondents did offer Rosenthal reinstatement in May after the filing of the charge of discrimination against him. If there had been a discrimination against him, that uncondi-

⁴²Counsel for the Respondents testified that he would not have known how to get in touch with counsel for the General Counsel during the week end.

tional offer would have terminated the Respondents' responsibility when Rosenthal failed to accept it. Of course, a new unfair labor practice might have arisen if the Respondents, having work for him, discriminatorily refused him employment a few days later when he offered his services. But if the Respondents were concerned with this point, they apparently gave no thought to the replacement of Piasek with Rosenthal as a solution until after Piasek had given his testimony. It might be argued that it was Piasek's testimony that made it appear that the refusal of employment to Rosenthal when he applied for work after his deal fell through was an unfair labor practice. I am not persuaded that this argument has much force. All the evidence indicated that, with the exception of two short periods when Fellman or Zell did cutting, the Respondents had managed with one cutter—Piasek. The Respondents might, at those times, have eliminated any question of back pay to Rosenthal by recalling him to do that work, but apparently it was not considered important enough to do so. Likewise, after the summer layoff and after Piasek had gotten another job, they could have explained to him that they deemed it advisable to take Rosenthal back in order to safeguard themselves against the possibility of increasing back pay for Rosenthal. In sum, there were several other times when it would have been more logical for the Respondents to recall Rosenthal, if they were going to, than the time they actually did.

Evidence of the Respondents' displeasure with Piasek is found in the Armistice Day conversation between Lewis and Piasek, Lewis' action on the following Saturday to see if Greenberg was available as a cutter, Levitan's refusal to permit Piasek to work at all following the day he testified, and, without notice to Piasek, recalling Rosenthal to take Piasek's place. When Levitan told Piasek on November 17: "Listen, Gene, we don't need you now. If we need a cutter we will call you," Piasek apparently interpreted the statement as a temporary layoff. I interpret it, in the light of all the evidence as a complete termination.

With respect to the apparent suddenness of the decision to recall Rosenthal without consulting with counsel for the General Counsel, it is significant that in testifying about the conference which Perkins, Lewis, and Fellman held at the plant on the week end of November 21, Fellman did not testify that any question was raised by Lewis or Fellman concerning the discharge or layoff of Piasek. Fellman testified: "It was a very brief thing, a question of who to hire and who to call back for the cutting and asking Mr. Perkins if he thought it advisable to call Mr. Rosenthal back." Perkins testified about the conference: "The question of putting a cutter to work came up. I don't recall exactly how but I think I probably asked in view of the testimony going on here whether there was any work for a cutter, and, if so, what kind, and what kind of material they were running." Perkins did testify:

“* * * I believe it was stated to me that except for this suggestion of mine about taking Rosenthal back that Trina was going to call Piasek back. I think that information came up when I was asking him what cutting work there was to be done and what the prospects were and I believe I was informed by Mr. Fellman or by somebody there that there was some cutting work to do and it was intended to call back Piasek.” Later when asked whether he had taken into account, in making his recommendation, the position that the General Counsel might take with regard to Piasek in the event he were discharged and Rosenthal were rehired, Perkins replied: “Well, I believe I considered that. At the time I gave the advice, I don’t know that it was discussed.” Failure to take the question up with counsel for the General Counsel before acting on the decision appears particularly significant. The fact that the matter could not have been discussed with the latter before Monday morning, November 23, is a weak excuse since the delay of an additional day after such a long delay up to that time would have meant little in the way of additional liability for back pay for Rosenthal, especially in comparison to the amount that might be involved if Piasek were found to have been discriminated against. Unless the Respondents had already discharged Piasek in anger because of his testimony at the hearing and were adamant in opposing his further employment, I cannot believe that counsel would have permitted them to run the risk that could be avoided by waiting until Monday morning.

After the filing of the charge with respect to Piasek, the General Counsel notified Respondents' counsel of his position regarding Rosenthal and Piasek, stating that the May, 1953, offer to Rosenthal was deemed to cut off back pay for him and urging reinstatement of Piasek. The request was refused, although it was apparent that, if any back pay were to be involved, it would then be for Piasek and not for Rosenthal.

On all the evidence in the case, I am convinced and find that Piasek's employment was terminated on November 17, 1953, the day following his testimony in the hearing in this case and not on the following week end when Rosenthal was recalled. At the time of the week-end conference, I find that the question raised was not whether Piasek should be discharged and Rosenthal recalled, but what the Respondents were to do about getting a cutter for a position already vacant. Although Perkins was not positive about it, there may have been some discussion about Piasek. The fact that Rosenthal was out of work and that the unfair labor practice charge involving him had not been settled offered an appealing solution to the problem. I am convinced and find that, but for the Respondents' having already discharged Piasek for having testified against them, the Respondents would not have recalled Rosenthal when they did. I find, therefore, that by discharging Piasek on November 17, 1953, the Respondents discriminated against him in violation of Section 8 (a) (3) and (4) of the Act.

The supplemental complaint, as amended at the hearing, also alleges that Piasek was discriminatorily laid off on October 16, 19-23, inclusive, and on November 5, 6, 9, and 11, 1953. I have found no evidence that Piasek presented himself for work at the Venice plant before October 23. As a result of his conversations that day and the next, he was started to work on Monday, October 26. I find no evidence of discrimination or even a layoff in October. Piasek was laid off on November 5 and 6 but was told to report back to work on November 9 and, so far as the record discloses, he may have done so. It is apparently the theory of the General Counsel that the layoff on November 5 and 6 was discriminatory because the available cutting work was given to Zell instead of to Piasek. By November 5, Zell, who had been started on a piece rate basis, was getting a salary of \$85 a week, apparently having been given supervisory status. Piasek was paid on a piecework basis. Because Zell had to be paid his salary whether or not there was work for him, the Respondents may have deemed it more economical to let him do the cutting work. If there was any discrimination against Piasek on those days, it does not appear to have been motivated by his union membership or activity. Piasek appeared at the hearing on Tuesday, November 10. He was at the plant on November 11, the day Lewis called him to the office to ask Piasek why he had to testify in the case. Piasek did not testify that he did not work on that day and there is no other evidence thereon. I find, therefore,

that Piasek was not discriminatorily laid off before November 17.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents, set forth in Section III, above, occurring in connection with the operations of the Respondents described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondents engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

California served notice of termination of its contract with the Union on the expiration of a year after its effective date. It may be argued that it was under no duty thereafter to bargain with the Union without proof of a majority. However, I have found that the Respondents' unfair labor practices had the effect of undermining the Union and of dissipating its majority. The situation prevailing before the commission of the unfair labor practices can be restored only if the Respondents are required to recognize and to bargain with the Union. Trina was acting as an agent or alter ego of California. As this

relationship was terminated on January 1, 1954, and as Trina has not been shown to be acting on California's behalf thereafter or even shown to be in operation since that date, I shall limit the recommendation to bargain to the Respondent California and its partners, agents, successors, and assigns, except to the extent that Trina may hereafter act on behalf of California.

It is the contention of the General Counsel that the remedy should include a restoration *ab initio* of wages, rates, and other conditions called for by the Union's collective bargaining contract, which terms and conditions were unilaterally changed by the Respondents. I have found this unilateral conduct to be a violation of both Section 8 (a) (1) and (5) of the Act, but I have grave doubts of the propriety of such a remedy as that suggested by the General Counsel. Specific losses to individual employees as a result of such changes have not been shown, and I do not believe it wise to require action of unascertained limits. Normally, damages for breach of contract are determined in a court action, and Section 301 makes it possible for a Union to sue for such damages in Federal Courts where proof may be offered of specific losses or damages. Although a breach of contract may be also an unfair labor practice, I do not believe it would effectuate the policies of the Act to disregard the borderline between the two. Furthermore, if the parties comply with the recommendation to bargain herein made, it is conceivable that they may work out a solution which will more appropriately settle the dispute than an

order in general terms would do. I shall, therefore, make no recommendation with respect to retroactive restoration of contract terms.

Both Respondents were employers at the time of the discriminations against Roark and Piasek. But as Trina is not shown to be in business and no longer has any connection with the plant where Roark and Piasek were entitled to employment, only California would have control over their positions. Therefore, I shall recommend that California offer them reinstatement to their former or substantially equivalent positions⁴³ without prejudice to their seniority or other rights and privileges. Both Respondents are, however, responsible for any loss suffered by Roark and Piasek as a result of the discrimination against them, and I shall recommend that the Respondents jointly and severally make them whole for any loss suffered by them by paying to each a sum of money equal to that which he would normally have earned from the date of the discrimination against him to the date of the offer of reinstatement⁴⁴ less his net

⁴³The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

⁴⁴The period of discrimination in Roark's case is February 1 to about November 1, 1953, the date when she was offered reinstatement; in Piasek's case, from November 17, 1953, to the date on which California shall have offered him reinstatement. Trina's liability to Piasek shall not extend beyond January 1, 1954, when it severed its connection with California and ceased doing business.

earnings⁴⁵ during such period. Such sums are to be computed on a quarterly basis in accordance with the Board's established practice.⁴⁶

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. United Shoe Workers of America, Local 122, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Blanche Roark and Eugene Piasek because of their union membership and activities, thereby discouraging membership in the Union, the Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Eugene Piasek because he gave testimony in the hearing in this case, the Respondents have engaged in, and are engaging in, an unfair labor practice within the meaning of Section 8 (a) (4) of the Act.

4. All production workers employed in the California Footwear Company plant at 253 South Los

⁴⁵Crossett Lumber Company, 8 NLRB 440, 497-8. See also Republic Steel Corporation v. N.L.R.B., 311 U.S. 7.

⁴⁶F. W. Woolworth Company, 90 NLRB 289; N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344.

Angeles Street, Los Angeles, California, prior to February 1, 1953, and all production workers employed at the Respondents' plant at 222 Main Street, Venice (Los Angeles), California, since February 1, 1953, excluding executive, administrative, sales, clerical, maintenance employees, truck driver, guards, professional and supervisory employees as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. United Shoe Workers of America, Local 122, is now, and at all times material herein has been, the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. By refusing to bargain collectively with the Union, the Respondents have engaged in, and are engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

7. By the foregoing conduct and by interfering with, restraining, and coercing their employees, the Respondents have engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

9. The Respondents have not discriminated in regard to the hire and tenure of employment of Anna Cherry or Jack Rosenthal.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that:

Jack Lewis and Joe Levitan, a co-partnership doing business as California Footwear Company, its partners, agents, successors and assigns, and Trina Shoe Company, a corporation, its officers, agents, successors, and assigns (to the extent that it has acted or in the future may act on behalf of Respondent California Footwear Company or its partners, agents, successors, or assigns) shall:

1. Cease and desist from:

(a) Discouraging membership in United Shoe Workers of America, Local 122, or any other labor organization of their employees, by terminating the employment of any of their employees discriminatorily and by thereafter failing and refusing to reinstate them, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(b) Discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act.

(c) Refusing to bargain collectively upon request with United Shoe Workers of America, Local 122, as the exclusive representative of all production employees employed in the appropriate unit hereinabove found.

(d) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Shoe Workers of America, Local 122, as the exclusive representative of the employees in the bargaining unit, described above, with respect to wages, rates of pay, hours of employment, or other conditions of employment.⁴⁷

(b) Offer to Eugene Piasek immediate and full reinstatement to his former or substantially equivalent⁴⁸ position without prejudice to his seniority or other rights and privileges.⁴⁹

(c) Make whole Blanche Roark and Eugene Piasek for any loss suffered by them, as a result of

⁴⁷Trina will not be obliged to bargain so long as it does not act in California's interest as an employer.

⁴⁸The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

⁴⁹Except to the extent that Trina may after January 1, 1954, represent California as it did in 1953, this offer is to be made by California alone.

the discrimination against them, in the manner set forth in the Section entitled, "The remedy," above.

(d) Upon request, make available to the Board or its agents, for examination or copying, all payroll, social security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Recommended Order.

(e) Post at the Venice plant copies of the notice attached hereto and marked "Appendix B." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region (Los Angeles, California), shall, after having been signed by the authorized representative or representatives of the Respondents, be posted by California immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent California to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the date of the service of this Intermediate Report and Recommended Order of what steps the Respondents have taken to comply herewith.

It is recommended that, unless on or before 20 days from the date of service of this Intermediate Report and Recommended Order, the Respondents shall have notified the aforesaid Regional Director

in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

It is further recommended that the complaint be dismissed with respect to Anna Cherry and Jack Rosenthal.

Dated this 28th day of April, 1954.

/s/ JAMES R. HEMINGWAY,
Trial Examiner.

Appendix A

Fellman's Letter to Employees on About
March 23, 1953

Trina Shoe Co.
Costa Mesa, California
Beacon 6052

A Statement of Facts

In view of the fact that the United Shoe Workers Union has distributed leaflets headed by a statement bearing my signature, I feel that I must explain my connection with it.

Because of the many inaccuracies in the leaflet and the false inducements offered by the union, I do not want anyone to get the impression that my

signature is in any way an endorsement of the union or their promises.

The facts are as follows: I was approached by the representatives of the union and presented with a contract which they asked me to sign. I took the position and signed a letter to the effect that I would not sign the employees to anything without their consent and demand.

Their efforts to sign a majority has led them to make extravagant promises and statements which are contrary to fact as follows:

Union scale does not offer \$1.00 minimum (sic) per hour as evidenced by section on wages taken from their contract and posted for your inspection. Wage increases are not intended by their contract as underlined in Paragraph 2C.

All Shoe Factories in Southern Calif. are not union. In fact, out of five factories making the same type and price shoe as ours only one is union. These factories by name are:

L. A. Shoe—Pasadena.....	Non-union
EmBee—Los Angeles	Non-union
Puritan Shoe Co.—Los Angeles.....	Non-union
Trina Shoe—Venice	Non-union
Kay Shoe Co.—Los Angeles.....	Union

Other benefits promised by the union you already have.

Namely:

Paid Holidays

Paid Vacation

4 Hours call in pay (State Law)

Hospitalization

Surgical, Medical and Life Insurance

Note also:

The union is offering you an application for \$1.00. This fee does not cover membership.

Our policy can be summed up as follows. We respect the right of any worker to seek employment without payment of fees or being subject to the prejudices of a union hiring hall.

Signed:

.....,
MAURICE FELLMAN
Pres. Trina Shoe Co.

(In script): Any further questions, feel free to discuss with me.

Appendix B

Notice to All Employees Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, the undersigned California Footwear Company and (to the extent that it may have acted, or may in the future act, on behalf of California Footwear Company) Trina Shoe Company hereby notify all employees at the plant at 222 Main Street, Venice, California, that:

We Will Not discourage membership in, or activities on behalf of, United Shoe Workers of America, Local 122, or any other labor organization, by discriminating in regard to the hire or tenure of employment or any term or condition of employment of any employee.

We Will Not discharge or otherwise discriminate against any employee because he has filed charges or given testimony under the Act.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist United Shoe Workers of America, Local 122, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will bargain collectively, upon request, with United Shoe Workers of America, Local 122, as the exclusive representative of all our employees in the bargaining unit described below concerning wages, rates of pay, hours of employment, and other conditions of employment. The bargaining unit is:

All production workers excluding executive, administrative, sales, clerical, maintenance em-

ployees, truck driver, guards, professional and supervisory employees, as defined in the Act.

We Will offer Eugene Piasek immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges.

We Will make whole Blanche Roark and Eugene Piasek for any loss of pay they may have suffered by reason of the discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining members in the above-named Union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

CALIFORNIA FOOTWEAR
COMPANY,

(Employer.)

Dated

By,
(Representative) (Title)

TRINA SHOE COMPANY,
(Employer.)

Dated

By,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

United States of America Before the
National Labor Relations Board

Case No. 21—CA—1659

JACK LEWIS AND JOE LEVITAN, d/b/a CAL-
IFORNIA FOOTWEAR COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Case No. 21—CA—1658

TRINA SHOE COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Case No. 21—CA—1863

JACK LEWIS AND JOE LEVITAN, d/b/a CAL-
IFORNIA FOOTWEAR COMPANY, AND
TRINA SHOE COMPANY,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

DECISION AND ORDER

On April 28, 1954, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding, finding that the Respond-

ents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as more fully set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other alleged unfair labor practices, and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases,¹ and hereby adopts the findings,² conclusions, and recommendations of

¹Following the issuance of the Intermediate Report, the parties entered into a stipulation setting forth certain additional facts with respect to the sales by Respondent Trina to Respondent California during 1953. The aforesaid stipulation is hereby accepted and made part of the record herein.

²On the basis of the facts set forth in the Intermediate Report, we find that during 1953 the Respondents constituted a single employer for jurisdictional purposes. We further find, on the basis of the Respondents' direct out-of-state sales and shipments, valued in excess of \$50,000, that it would effectuate the policies of the Act to assert jurisdiction herein over both Respondents. *Jonesboro Grain Drying Cooperative*, 110 NLRB 481, at pp. 483-484.

the Trial Examiner,³ with the following additions.

1. We agree with the Trial Examiner that Respondent California was under a statutory obligation to bargain with the Union with respect to moving the plant to Venice; that it violated this obligation by refusing to discuss with the Union the transfer of the employees to the new location, for the false reason that it had no control over the management of the new plant; and that the Respondents engaged in unlawful interrogation and surveillance, following the move, for the purpose of defeating the Union's efforts to obtain adherents among the Venice employees.

The Trial Examiner also found, and we agree, that the Respondents unlawfully refused to bargain with the Union after the removal of the plant from Los Angeles to Venice. The Respondents refused to apply the bargaining agreement covering the Los Angeles employees to the Venice employees; unilaterally established wages and working conditions at Venice which differed substantially from those required by the bargaining agreement; and refused to recognize the Union as the representative of the employees at the Venice plant. By these actions, the Respondents clearly refused to bargain with the Union.

³Acting Chairman Rodgers would find that the Respondents violated Section 8 (a) (1) of the Act by surveillance and interrogation; Section 8 (a) (4) by discharging Piasek; and Section 8 (a) (5) only in the manner indicated in his dissenting opinion.

In disagreeing with the Trial Examiner's conclusions that the refusal to bargain mentioned in the last preceding paragraph was unlawful, our dissenting colleague rests his contrary conclusion on the sole fact that there was an economic reason for the removal of the plant to Venice. In so doing he ignores the presence and significance of an important additional fact found by the Trial Examiner as follows:

“On all the evidence in the case it appears and I find, that California took fortuitous advantage of its expedient removal of its plant to new leased quarters and resorted to a subterfuge in setting up Trina as a ‘front’ for itself in order to disregard its contract with the Union and to alter wages and working conditions from those called for by its contract with the Union.”

Specifically, as detailed in the Intermediate Report, Respondent California made a contractual arrangement with one of its own foremen, Fellman, who with his wife owned a corporation called Trina, under which Trina was the ostensible employer at the Venice plant. However, the Trial Examiner found that “In reality, the effect of the arrangement was that Fellman lent his corporate structure to California for the sake of appearance but occupied, himself, a position akin to that of foreman for California.” Accordingly, the Trial Examiner found and our dissenting colleague agrees that despite the superficial formalities, “California was, during

1953, in reality the principal and Trina was its alter ego or agent," in the operation of the Venice plant.

Under these circumstances the fact that there was an economic reason for removal of the plant ceases to be controlling. We can see no real difference between the case of an employer who decides to move his plant to run away from his union rather than for economic reasons, and an employer who, as here, moves his plant for economic reasons but decides to utilize the move as an opportunity to get rid of the union, resorting to deceit and subterfuges including the setting up of a false front in an effort to conceal the fact that he remains the employer while he pretends to the union and his employees that he has ceased production and has nothing to do with employment at the new location.⁴ That the union cannot muster a majority at the new plant because the conduct has achieved its desired end is no more material in finding and remedying a violation of the existing obligation to recognize and bargain with the union in the latter situation than in the former. We cannot agree with the suggestion of our dissenting colleague that it is not unlawful and not a violation of Section 8 (a) (1) and (5) of the Act for an employer to embark on a course of conduct

⁴The fallacy in our dissenting colleague's approach which treats the mere existence of economic reasons to move the plant as controlling is apparent if we consider its application to an economic layoff. The mere fact that economic reasons require that some employees be laid off does not immunize an employer from liability for utilizing a layoff as an opportunity to undermine the union in accomplishing it.

specifically designed to dissipate the majority status of a collective bargaining representative, simply because the context in which he engages in such conduct is a removal of his plant to a new location for economic reasons.

Moreover, viewing this case in the most favorable light possible to the Respondents, it is one where the Union's loss of majority is solely because of conduct which in part is lawful (an economic decision to move the plant) but in part is unlawful in the subterfuges adopted to utilize the move as an opportunity to rid the employer of the Union. In such circumstances the well-established principle is that the burden is upon the Respondents to disentangle the consequence of their lawful conduct from the consequences of their unlawful conduct; and hence to establish that the Union's loss of majority resulted from their lawful conduct;⁵ failing this, the Union's loss of majority must be deemed to flow from their unlawful conduct.

The Respondents here have failed to meet this burden. The most that can be said for the Respondents is that, because of their bad faith conduct, we cannot know for certain whether, if Respondent California had bargained in good faith concerning the transfer of the employees from Los Angeles to Venice, and had not deliberately misled the Union

⁵*N.L.R.B. v. Swinerton, et al.*, 202 F. 2d 511, 515-516 (C.A. 9), cert. den. 346 U.S. 814; *N.L.R.B. v. The Barrett Company*, 135 F. 2d 959, 961-962 (C.A. 7).

and the employees as to the Respondents' future plans and their continuing identity as a single Employer, a sufficient number of the employees would have transferred to have preserved the Union's majority. But this lack of certitude is not enough to exculpate the Respondents from the consequence of their unlawful conduct; as the uncertainty was created by the Respondents, it must be resolved against them.⁶

Contrary to the assertion of our dissenting colleague, the Brown Truck and Trailer case⁷ is distinguishable on its facts from the present case, and is therefore inapplicable. In Brown, the refusal to bargaining concerning the transfer of the employees was motivated by no more than an erroneous belief as to the extent of the obligation to bargain under the Act. Here, however, Respondent California was well aware of its obligations under the Act, but chose to disregard them as part of a plan to eliminate the Union as the representative of its employees. In Brown there was lacking the element of a plan to escape the Union by subterfuge in the course of the move. In Brown, moreover, the dis-

⁶N.L.R.B. v. The Barrett Company, *supra*. See also Tennessee-Carolina Transportation, Inc., 108 NLRB 1369, 1371, footnote 4, where the Board, including our dissenting colleague, pointed out that whether or not employees would have accepted an offer of employment was not susceptible of any objective test unless and until the offer was made.

⁷Brown Truck and Trailer Manufacturing Company, Inc., 106 NLRB 999.

tance between the old plant and the new, and the new, and the fact that the two plants were located in two separate cities, 30 miles apart, one, Charlotte, with a population in excess of 130,000, the other, Monroe, with a population of approximately 10,000,⁸ raised problems with respect to such physical factors as transportation and relocation which raised serious doubts that a majority of employees would have transferred to the new plant even if the Respondent there had bargained in regard to transfers. Here, however, the two plants are only fifteen miles apart and both are located in the Los Angeles metropolitan area, Venice being only a suburb of Los Angeles. We do not believe such a move as this would place the plant beyond normal commuting practices in such metropolitan areas.

The interpretation which our dissenting colleague places upon the Brown case would in effect establish an inflexible rule that the removal of a plant for economic reasons, no matter what the circumstances surrounding the move, terminates any preexisting obligation to bargain with the employees' representative, which obligation is not revived unless that representative establishes a new majority at the new location. We cannot agree that such a result is either required by the Act, or is necessary in order to effectuate its policies. We believe, rather, that effectuation of the policies of the Act requires that the Board, in this type of case as in any other, not permit an employer to profit by his own unlawful

⁸Rand McNally-Cosmopolitan World Atlas, 1954 edition.

conduct; each case of this type must therefore be decided on the basis of its own facts, including both the character of the employer's conduct and the probabilities resulting from the surrounding physical circumstances. In view of these considerations, therefore, and on the basis of the facts in this case, we find that, in the absence of affirmative evidence that a majority of the Los Angeles employees would not have transferred to Venice if the Respondents had fulfilled their obligations under the Act, it is not unreasonable to believe that they would have done so. We further find, in agreement with the Trial Examiner, that the Union's loss of majority was directly attributable to the Respondents' unfair labor practices, and that by refusing to recognize and bargain with the Union at Venice, the Respondents violated Section 8 (a) (5).

We further disagree with our dissenting colleague that the preexisting contract did not continue in effect after the removal of the plant from Los Angeles to Venice, although we do agree that the term "in effect," as used in Section 8 (d), is to be construed in the light of the Board's contract bar doctrines.⁹ Under such doctrines, a change in the situs

⁹The Board has also held, without specific reference to Section 8 (d), that an employer's obligation to recognize and bargain with a contracting union continues throughout the period when the contract would bar a determination of representatives. *Hexton Furniture Company*, 111 NLRB 342; *Royal Cotton Mill Company, Inc.*, 109 NLRB 186; *Sanson Hosiery Mills, Inc.*, 92 NLRB 1102, enf. 195 F. 2d 350 (C.A. 5); cf. *Sears Roebuck & Company*, 110 NLRB 226.

of operations does not remove a contract as a bar when the operations and physical equipment remain substantially the same, and a substantial percentage of the employees at the old plant have transferred to the new.¹⁰ Here the operations and physical equipment remained substantially the same and, as we have found, the failure of a substantial number of the employees to transfer from Los Angeles to Venice must be attributed to the Respondents' unfair labor practices. As effectuation of the policies of the Act requires that conditions at the Respondents' plant be restored as nearly as possible to those which would have existed in the absence of the Respondents' unfair labor practices,¹¹ the contract must therefore be deemed to have remained "in effect" until it could lawfully be terminated in accordance with the requirements of Section 8 (d). As the contract was still "in effect" at the time the Respondents refused to apply it to the Venice employees, and unilaterally changed the wages and working conditions of their employees, we find, in agreement with the Trial Examiner, that the Respondents thereby unlawfully refused to bargain with the Union, within the meaning of Section 8 (d) and Section 8 (a) (5).

2. We also agree with the Trial Examiner that the Respondents discriminated against Blanche

¹⁰The Mennen Company, 105 NLRB 677; Pluss Poultry, Inc., 100 NLRB 64.

¹¹Ford Motor Company, 31 NLRB 994, 1099-1101.

Roark, chief steward of the Union, both at the time her employment at the Los Angeles plant was terminated, and on February 5, 1953, when she was denied employment at the Venice plant. The Trial Examiner's findings, that the Respondents' actions with respect to Roark were discriminatorily motivated,¹² are fully supported by the record, and our dissenting colleague does not appear to contend otherwise. Rather, he appears to rest his disagreement upon the propositions that Roark's termination was lawful because the termination of operations at the Los Angeles plant was lawful, and that the denial of employment at Venice was lawful because the type of employment which she requested was not available. However, the Trial Examiner did not find, as our dissenting colleague seems to assume, that the termination of Roark's employment at the Los Angeles plant was itself discriminatory; he found, rather, that discrimination occurred, at that time when Roark, for discriminatory reasons, was not offered a continuation of employment at the new plant. The Trial Examiner finds that Roark was one of a group of five employees that Fellman told Lewis he would like to have at the Venice plant if available, and that if he had not been adversely influenced by Lewis he would have made arrangements to take her to Venice. It is therefore not material to

¹²We find it unnecessary, however, to rely on the Trial Examiner's reference to the Respondent's refusal to bargain concerning the transfer of the employees.

this finding of discrimination that the closing of the Los Angeles plant was not unlawfully motivated. With respect to the Respondent's further denial of employment to Roark at Venice, Fellman admitted that work was available for her on February 5, when she first applied; and, as found by the Trial Examiner, the Respondents failed to offer her employment on that date for discriminatory reasons. As the discrimination on that date occurred at a time when work was available, it is therefore of no consequence that work may not have been available 2 days later.

Order

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Jack Lewis and Joe Levitan, a copartnership doing business as California Footwear Company, its partners, agents, successors and assigns, and Trina Shoe Company, a corporation, its officers, agents, successors, and assigns (to the extent that it has acted or in the future may act on behalf of Respondent California Footwear Company or its partners, agents, successors, or assigns) shall:

1. Cease and desist from:

(a) Discouraging membership in the United Shoe Workers of America, Local 122, or any other labor organization of their employees, by terminating the employment of any of their employees dis-

criminatorily and by thereafter failing and refusing to reinstate them, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) Discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act;

(c) Refusing to bargain collectively upon request with United Shoe Workers of America, Local 122, as the exclusive representative of all production employees employed at the Respondents' Venice (Los Angeles), California, plant, excluding executive, administrative, sales, clerical, and maintenance employees, truck drivers, guards, professional employees, and supervisors as defined in the Act, and

(d) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Shoe Workers of America, Local 122, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Shoe Workers of America, Local 122, as the exclusive representative of the employees in the above-described appropriate bargaining unit with respect to wages, rates of pay, hours of employment, or other conditions of employment;

(b) Offer to Eugene Piasek immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make Eugene Piasek and Blanche Roark whole for any loss of pay suffered as a result of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payrolls records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(d) Post at their Venice, California, plant, copies of the notice attached to the Intermediate Report as Appendix B.¹³ Copies of said notice, to be

¹³This notice shall be modified by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event this Order is enforced by a decree of a United

furnished by the Regional Director for the Twenty-first Region (Los Angeles, California), shall, after having been duly signed by the authorized representative or representatives of the Respondents, be posted by Respondent California immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent California to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

It Is Hereby Further Ordered that except as otherwise found herein, the complaint in these cases be, and it hereby is, dismissed.

Dated, Washington, D. C., Oct. 31, 1955.

ABE MURDOCK,

Member,

IVAR H. PETERSON,

Member,

[Seal]

NATIONAL LABOR RELATIONS BOARD.

States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Philip Ray Rodgers, Acting Chairman, dissenting in part:

1. This case involves, *inter alia*, a question concerning the continuance of an employer's bargaining obligations where, for reasons having no connection with employee rights protected by the Act, the Employer removes his plant to a new location. I do not agree with my colleagues' resolution of the issues pertaining to this matter.

As is set forth in the Intermediate Report, the Respondent¹⁴ and the Union were parties to a collective bargaining agreement covering employees at the Respondent's Los Angeles plant. The agreement was effective until September, 1953. In January, 1953, the Respondent closed the Los Angeles plant, and moved to a new plant, some 15 miles distant, in Venice, California. The record shows, and the Trial Examiner found, that the moving of the plant was prompted by personal and economic considerations, and not by any antiunion considerations.

When the Union learned that the Los Angeles plant was to be moved it talked with the Respondent about transferring the Los Angeles employees to the Venice plant. The Respondent, however, declined,

¹⁴I agree with the conclusions of my colleagues and the Trial Examiner that Respondent Trina was the agent, or alter ego, of Respondent California; and that together they constituted a single employer within the Act's meaning. The term "Respondent" is used, in this opinion, to signify both Trina and California as a single entity.

asserting that the Venice plant would be under a management over which it lacked control. Subsequently, 3 weeks after the Venice plant had begun to operate, the Union notified the Respondent that the Los Angeles employees requested employment at Venice as jobs became available. The Union also took the position that its bargaining agreement with the Respondent covering employees at the Los Angeles plant continued in being and was applicable to employees at the Venice plant. The Union further asked that, without any reference to the Los Angeles agreement, the Respondent recognize it as the representative of the Venice employees. The Respondent agreed to this latter request, provided the Union could show that it represented a majority at that plant. Though it attempted to do so, the Union could not make such a showing. In fact, the Union never secured the support of a majority of the Venice employees.

Only three of the Los Angeles employees applied in person for employment at Venice. Of these, two were hired. The third, Roark, was not hired, but, as I indicate below, I do not think the failure to hire Roark was discriminatory. In addition, the Respondent itself offered jobs at Venice to two other Los Angeles employees, both of whom went to work there.

On these facts, my colleagues, in agreement with the Trial Examiner, hold that the Respondent violated Section 8 (a) (5) of the Act when it failed to discuss with the Union the transfer of employees

from Los Angeles to Venice. With this conclusion I agree. But my colleagues, in agreement with the Trial Examiner, further find that the Respondent violated Section 8 (a) (5) in each of the following particulars: By refusing to apply the bargaining agreement covering Los Angeles employees to the Venice plant; by establishing wages and working conditions for the Venice employees different from those in the Los Angeles agreement; and by refusing "to recognize" the Union as the representative of the Venice employees. With these latter conclusions, I cannot agree.

The problem of this case is not a new one for the Board. In the very recent, and very similar, Brown case,¹⁵ (which I think is controlling here) the employer, because of economic considerations, and not to avoid collective bargaining or to discourage union membership, moved his North Carolina plant from Charlotte to Monroe. The Employer failed to give notice to the Union, the majority representative of the Charlotte employees, in advance of the move. The Board ruled that because of the considerations behind the move, the termination of the employment of the Charlotte employees and the failure to hire them at Monroe did not violate the Act. It held

¹⁵Brown Truck and Trailer Manufacturing Company, Inc., 106 NLRB 999 (Panel decision by Members Houston and Peterson; Chairman Farmer disputed the Union's majority status, and therefore did not pass upon the other matters decided in the case). See also National Hardware Co., 55 NLRB 71.

further that the Employer's failure to discuss with the Union the movement of the plant in advance of the move, thus, failing to give the Union an opportunity to discuss the placement of the Charlotte employees in positions at Monroe, was a refusal to bargain within the Act's meaning. The Board specifically rejected both the Trial Examiner's finding that the Union was the statutory representative of the Monroe employees, and his derivative conclusion that the employer had violated Section 8 (a) (5) by not bargaining with the Union concerning those employees. With respect to this latter issue the Board said:¹⁶

It is perhaps possible that, if the Brown Company had fulfilled its obligation to bargain with the Union with respect to the location of the Charlotte plant employees at Monroe, an agreement may have been concluded resulting in the transfer of the employees in question. We cannot assume, however, that even if such agreement had been reached, Charlotte employees would have transferred to Monroe in numbers sufficient to constitute a majority of the employee complement at the Monroe plant. In the light of these circumstances and the lack of antiunion motivation behind the move to Monroe, we do not believe that we should attribute to the Union statutory representative status in

¹⁶*Ibid.*, page 1002.

in the absence of affirmative evidence that a majority of the employees at the Monroe plant have, in fact, designated the Union as their bargaining representative.

The conclusions of the Trial Examiner and of my colleagues that the Respondent violated the Act by refusing to bargain with the Union after the movement of the Respondent's plant to Venice is predicated upon two premises. The first premise is that the Respondent's failure, in violation of the Act, to talk to the Union about transferring the Los Angeles employees to Venice rendered immaterial the fact that the Union never represented a majority of the employees at the Venice plant. The second premise is that the bargaining agreement covering the Los Angeles employees continued "in effect" at the Venice plant, thereby preventing the Respondent from modifying the terms of the agreement without first satisfying the procedural requirements of Section 8 (d).¹⁷ Both these premises, in my opinion, are unsound.

The Trial Examiner rested his position upon the proposition that the Union's loss of majority "can

¹⁷Section 8 (d) provides in pertinent part: "* * * where there is in effect a collective bargaining contract * * * the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification" gives, among other things, a written 60-day notice of the proposed termination or modification.

be directly traced" to the Respondent's initial failure to talk about the transfer of employees from Los Angeles to Venice. This "direct tracing" of the loss, however, did not find its way into the Intermediate Report. My colleagues also say that the loss of majority was "directly attributable to the Respondent's unfair labor practices" (emphasis supplied). But my colleagues cite in this connection only one unfair labor practice—the failure to talk about the transfer of employees. They allude loosely to the fact that Respondent Trina was the alter ego of Respondent California, and they say that Trina was a "false front" for California, and that California played false with the Union and its employees by not disclosing it was running the Venice plant, but, significantly, they do not say that these acts were unfair labor practices. The truth, of course, is that they were not.

Nor do my colleagues explain satisfactorily why in this case they would put the burden "upon the Respondents to disentangle the consequences of their lawful conduct from the consequences of their unlawful conduct," whereas the Board imposed no such burden on the employer in the Brown case. It is no explanation to say, as do my colleagues, that the refusal to talk about the transfer of employees in the Brown case was motivated by an erroneous belief as to the extent of the obligation to bargain under the Act, or that there was lacking in the Brown case the element of a plan to escape the Union by subterfuge in the course of the move. For

the plain language of the Board's Decision in the Brown case declared that:

The Brown Company's agents [on June 18, 1952], deliberately created the impression that the Company was about to abandon its box plant operations completely. They acted similarly on August 7, 1952, when the Union explicitly renewed its bargaining request.¹⁸

Moreover the population and the distance figures cited by my colleagues as distinguishing characteristics are completely without significance. Surely my colleagues do not mean to proclaim that more people prefer to wend their perilous way through 15 miles of an involved and hectic metropolitan area, such as Los Angeles, rather than travel 30 miles on an open highway as in the Brown case. In short, my colleagues, without the "affirmative evidence" that the Board required in the Brown case, are making the precise assumption that the Board refused to make in that case. It seems to me therefore that my colleagues are either overruling the Brown case, or are now limiting the rule of that case to employers in North Carolina and are establishing a different rule for employers in California.

So far as Section 8 (d) is concerned, my colleagues advance no plausible explanation as to why the bargaining agreement covering the Los Angeles employees remained "in effect" at the Venice plant. The agreement itself forms no basis for such a re-

¹⁸Brown Truck and Trailer Manufacturing Company, Inc., *supra*, p. 1001.

sult, its terms being silent on the matter of the contract's continuance after the removal of the plant. There is neither Board nor Court precedent for such a construction of the words "in effect" in Section 8 (d). Indeed, what authority there is on the subject—the Board's own contract bar doctrine and the Brown case, cited above—clearly suggests that in the circumstances of this case the Los Angeles contract was not "in effect" at the Venice plant.¹⁹ To find that the contract was "in effect," my colleagues have recognized the need to reconcile the realities of this case with Board precedent pertaining to the contract bar doctrine. To do so, they again resort to a fiction. This time the transfer to Venice of a "substantial number" of employees is assumed. But whether expressed in terms of the transfer of a majority of the Union supporters, or a substantial number of employees, the fact remains that the majority's position rests not upon a fact but only upon a very questionable assumption.

¹⁹See *Clarostat Manufacturing Co., Inc.*, 88 NLRB 723. In that case, the Employer closed its plant in New York City, established a new plant in New Hampshire, and hired a new complement of employees. The Board specifically rejected the argument that a bargaining contract covering the New York employees barred an election at the New Hampshire plant. See also *Sylvania Electric Products, Inc.*, 87 NLRB 597.

The legislative history of the 1947 amendments to the Act shows a specific sanctioning of the Board's contract bar rules as dictating the dismissal of petitions when valid contracts are "in effect." Sen. Rep. No. 105, 80th Cong., 1st Sess. 25; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 50.

This is not a case in which an employer, impelled in whole or in part by antiunion considerations, moves its plant in order either to thwart its employees' organizational activities, or to avoid collective bargaining, or to gain release from the terms of an existing bargaining contract. We cannot therefore impose liability on the Respondent upon any such premise.²⁰ On the contrary, this is a case where the movement of the Respondent's plant resulted from economic and personal considerations. Because it was thus motivated, the Respondent could, and did, terminate its Los Angeles operations without violating the Act.²¹ If we accept the fact that the Respondent could do this—and it is most significant that the General Counsel made no claim, the Trial Examiner made no finding, and my colleagues do not now assert, that the Respondent could not—then I think the Board is impelled to conclude that the Respondent's bargaining obligation with respect to the Union terminated when it abandoned its Los Angeles operations. Accordingly, I would dismiss the complaint insofar as it alleges that the Respondent refused to bargain with the Union after the move had been made.

²⁰See, for example, *N.L.R.B. v. Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), cert. denied 344 U.S. 816; *N.L.R.B. v. E. C. Brown Co.*, 184 F. 2d 829 (C.A. 2); *Tennessee-Carolina Transportation, Inc.*, 108 NLRB 1369; *Jones Manufacturing Company*, 104 NLRB 117, 121; *Rome Products Company*, 77 NLRB 1217, 1219-1220.

²¹See *Bickford Shoe, Inc.*, 109 NLRB 1346, at p. 1347.

2. Contrary to my colleagues and the Trial Examiner, I would not find that the Respondent discriminated against Blanche Roark. The Trial Examiner concluded that because the Respondent did not offer Roark a job at the Venice plant before the Los Angeles plant closed down, and because the Respondent did not discuss with the Union the transfer of employees to the Venice plant, Roark was "an object of discrimination at the end of her employment" at the Los Angeles plant. In my opinion, these conclusions are wholly unwarranted. The Trial Examiner, as previously pointed out, found that the Los Angeles plant was closed down because of economic and personal reasons and not because of antiunion reasons. And though all the employees at Los Angeles were released when the plant closed down, the Trial Examiner made the finding that only the release of Roark was discriminatory. This conclusion with respect to Roark is clearly inconsistent with his prior finding that the closing of the Los Angeles plant was not illegally motivated and that presumably the termination of the other employees were lawful.

Neither do I perceive how the Respondent's failure to discuss the transfer of its employees to Venice establishes that the Respondent discriminated against Roark. Such a conclusion is even more untenable than the conclusion, already adverted to, that the failure to discuss that transfer demonstrates the Respondent's responsibility for the Union's lack of majority support at the Venice plant.

The Trial Examiner also concluded that the Respondent rejected Roarks' application for employment at the Venice plant because of her union membership and activity. With this conclusion I also disagree. The crucial issue with respect to this latter point is whether there was a job available when she personally applied for employment on February 5 and 7, 1953. It is the Respondent's position that there was no job available.

Roark had been in the Respondent's employ from 1950 until the Los Angeles plant shut down in January, 1953. During her first year, Roark had been a sock stitcher; thereafter, she had worked as a platform stitcher. There is no showing that Fellman, who was in charge of the Venice operation, and to whom Roark applied for employment in February, 1953, knew that Roark had ever worked for the Respondent as a sock stitcher. Fellman testified without contradiction that Roark applied for work as a platform stitcher. The Intermediate Report shows that at the time of Roark's application the Venice plant had need for only one full-time platform stitcher. On February 5, two employees, Oster and Murray, were dividing the platform stitching work. By February 7, the platform stitching work had been assigned exclusively to Oster. It is thus clear that for Roark to have been employed as a platform stitcher, the Respondent would have had to displace either Oster or Murray, or both of them.

The Trial Examiner does not find otherwise. He, however, viewed with skepticism the Respondent's

testimony that Oster became so proficient at platform stitching that it would not have been feasible to switch him to sock stitching. This completely ignores the Respondent's position that in order to have employed Roark, he would have had to demote Oster to another job where he would suffer reduced earnings. This the Respondent would not do. Certainly the law does not require the Respondent, in order to avoid a charge of antiunion discrimination, to transfer incumbent employees to less favorable positions in order to accommodate prounion applicants. It seems to me that the Respondent's position in this regard was both reasonable and sound. The Board has no right to substitute its concept of business management for that of the employer.

This statute places the burden of proving discrimination upon the General Counsel; it does not require the Respondent to prove nondiscrimination. Because of the facts discussed above, and because it is not established by the record that platform stitching work was otherwise available, I do not believe the General Counsel has sustained the burden of proving that Roark was discriminatorily denied employment at the time of her application.

Dated, Washington, D. C. Oct. 31, 1955.

PHILIP RAY RODGERS,
Acting Chairman,

NATIONAL LABOR RELATIONS BOARD.

Before the National Labor Relations Board

Case No. 21—CA—1659, 21—CA—1658

In the Matter of:

JACK LEWIS AND JOE LEVITAN, d/b/a CAL-
IFORNIA FOOTWEAR COMPANY ET AL.,

and

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122.

Tuesday, October 13, 1953

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock, a.m.

Before: William E. Spencer, Trial Examiner.

Appearances:

JEROME SMITH,

General Counsel, National Labor Relations
Board.

RICHARD A. PERKINS,

Appearing on Behalf of the Company.

MILTON S. TYRE,

Appearing on Behalf of United Shoe
Workers of America, Local 122.

• • •

Mr. Perkins: In order to complete the plead-
ings, may I propose a stipulation that the Answer
of Respondents Trina and California Footwear to

the Original Complaint stands as an answer to the Amended Complaint and to the Amendment thereto without further pleading subject to this qualification that Mr. Smith points out to me there may be a new paragraph number as a result of the First Amendment and we will have to check that to make sure, but, in essence, the defense would be the same and the respondent's position the same. We haven't the retyping available for the new Answers.

Mr. Smith: I have no objection to that with that qualification. I do understand counsel to have said the [10*] certification as alleged is conceded by California?

Mr. Perkins: Yes.

Mr. Smith: I have no objection to that procedure.

* * *

Mr. Smith: Before we go off the record, it would assist the general counsel in his case, and perhaps be relevant to the very problem we are talking about, if we could have a stipulation at this time in relation to the interstate commerce activities of the company.

I propose a stipulation that during the last ten months—or stating it differently, during the first ten months of the calendar year 1953, Trina manufactured and delivered to California, and thereafter California shipped directly in interstate commerce to points outside the State of California, shoes of a value in excess of \$50,000.00.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Perkins: That is satisfactory. [38]

* * *

Mr. Perkins: Then here is a textual statement which I believe we can agree to, subject to reservation that I have made.

For the period since January 3, 1953, Trina has paid all payroll and all payroll taxes on its employees. All production employees are carried on Trina's payroll records. California's payroll records show no production employees, that is, for the period since January 3, 1953. I take back the statement to the effect that California's payroll shows no production employees since January 3rd, '53. They do not show, those records do not show any production employees during March, 1953, the month in which General Counsel's Exhibits for identification 8 and 9 fall.

Trial Examiner Hemingway: Do I understand that you are just limiting it to the one month of March?

Mr. Perkins: As to the statement that California had no production employees and formerly had some employees after [52] January 3, '53, and down to a date which I don't now have. During the same period, that is, since January 3, '53, California paid directly for the account of Trina nearly all of the invoices for materials, supplies, and other expenses except payroll, payroll taxes, personal property taxes and insurance pertaining to the operations of Trina. Nearly all of said items, that is, all said items except the exceptions mentioned, were billed

to California. Certain invoices including personal property tax bills and insurance were rendered directly to and paid by Trina.

A policy of insurance on Trina's equipment provides that any loss shall be payable to Trina or to California mortgagee as their interests appear. California has advanced to Trina from January 10, 1953, to the present date, at approximately weekly intervals, sums of money totaling as of September 30, 1953, \$43,750.00. Trina has received no money from California other than such advances.

Trina made a few miscellaneous sales of leather and bindings to persons other than California. With the exception of proceeds from such sales, Trina has received no money since January 3, 1953, from any source other than California.

Trina's book bank balance during the month terminations from February through September, 1953, varied from a high of \$217.27 credit, to a low of \$203.10 overdrawn. The bank account of Trina never was actually overdrawn. The book overdrafts are accounted for by the filling out of checks during one accounting [53] period which checks were not actually issued until after a deposit was made.

Purchases made and expenses incurred by California for Trina are evidenced by invoices. Similarly, finished shoes sold by Trina to California are covered by invoices.

In its bookkeeping practices, California keeps separately (a) a record of advances to Trina, (b) a record of purchases made and expenses incurred

for Trina, and (c) a record of purchases of finished shoes from Trina.

A balance on these accounts is struck periodically, for example, on August 31, 1953, entries were made in California's books to show that as of that date a debt from California to Trina of \$52,396.23 was offset by prior California purchases and expenses for Trina in the sum of \$24,983.16 and by prior California advances to Trina in the sum of \$27,413.07. This offset left Trina with nothing owing on the purchases expenses account, but with the sum of \$11,075.20 due California under the advances account. Trina has made no payments to California toward either the purchases, expenses account, or the advance account, except in the offset manner heretofore stated.

Since January 3, 1953, Trina has sold its entire production of shoes to California and California has purchased shoes from no supplier other than Trina. As previously stated, Trina has, since January 3, 1953, made a few miscellaneous sales of leather and bindings to persons other than California. [54]

Is that O.K. so far, Mr. Smith?

Mr. Smith: Yes.

In connection with this stipulation, I propose the entry into evidence of General Counsel's Exhibit No. 3 with the stipulation that, as it covers the Month of August, 1953, it is generally illustrative of the status of advances and expenditures for the various other months between January of 1953, and the current date.

Mr. Perkins: We accept that as a correct statement to furnish foundation for the admission of the exhibit, subject only to our objection to materiality and subject to our possibly checking this and furnishing any other or different information which we may find.

We would agree, though, that the exhibit which we have here may be received as a prima facie evidence of the information which it contains and unless we do furnish other information on the subject, that it may be taken as facts therein stated.

Mr. Smith: Might we have an agreement that any such evidence be submitted before the close of general counsel's case, or by Thursday of this week, whichever is later?

Mr. Perkins: Yes.

Trial Examiner Hemingway: All right. General Counsel's Exhibit 3 is received in evidence. [55]

* * *

Mr. Smith: I now propose the introduction into evidence of General Counsel's Exhibits 8 and 9 by stipulation, with the following explanation and understanding that Exhibit 8 purports to be a list of all employees of Trina on March 24, 1953, to fall within the unit set out in paragraph 6 of the amended consolidated complaint, and that General Counsel's Exhibit No. 9 purports to be a similar list of all the employees of Trina on March 31, 1953, who fall within the unit set out in paragraph 6 of the amended consolidated complaint. In addition to this stipulation, I propose the stipulation that the

employee, Albert Lewis of Trina is and has been at all times, that he has enjoyed employee status at Trina as supervisor as that term is defined in Section 2, Subsection 11 of the National Labor Relations Act, as amended.

Trial Examiner Hemingway: You joining in that stipulation?

Mr. Perkins: Yes, that is satisfactory. That is, primarily that the Albert Lewis employee status in terms of exclusion from the production employee unit, because we don't contend that he does come in. As far as the stipulation for other purposes, that he is a supervisor, we want to reserve on that. But if this is for the purpose of establishing a production unit, I will go along with that.

Trial Examiner Hemingway: You mean he would be a supervisor for some purposes, but not for others?

Mr. Perkins: No, I am trying to agree with general counsel [60] on the list of employees on these days. That will do. [61]

* * *

MAURICE FELLMAN

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Hemingway: State your full name, please.

The Witness: Maurice Fellman. [73]

Trial Examiner Hemingway: F-e-l-l-m-a-n?

The Witness: Yes.

(Testimony of Maurice Fellman.)

Trial Examiner Hemingway: Your home address?

The Witness: 3rd and Ashland, Santa Monica, California.

Direct Examination

By Mr. Smith:

Q. Will you state your position or occupation at the present time?

A. President of Trina Shoe Company.

Q. Apart from your office in the company, what has been your position or function with respect to the company in the past several months?

A. General Manager.

Q. And from what date have you held that position of General Manager of Trina Shoe Company at the Venice location of the company?

A. Since the latter part of December.

Q. That is, of 1952; is that correct?

A. That is right.

Q. And from the latter part of December up to the present time, have you devoted full time to the job of General Manager of Trina Shoe Company?

A. Yes.

Q. And has your position or function with the company changed in any material respect in that 10-month period? A. No.

Q. Have you ever been an employee of California Footwear? [74] A. Yes.

Q. And were you an employee of that company while it was located at the Los Angeles address?

(Testimony of Maurice Fellman.)

A. Yes.

Q. From what date—strike that.

During what dates, what period of time were you employed by California Footwear?

A. October 1, approximately, up to the time that Trina moved to Venice.

Trial Examiner Hemingway: October 1, 1952?

Q. (By Mr. Smith): Until late December, 1952? A. That is right.

Q. Who employed you at California Footwear?

A. By name?

Q. Yes, what individual? A. Jack Lewis.

Q. In the three months, roughly, that you were employed at California Footwear, did your duties remain approximately the same? A. Yes.

Q. What was your job there?

A. Pattern making.

Q. Did you have any other duties?

A. Not duties, no.

Q. Did you perform any other function in connection with the [75] California Footwear Plant?

A. No, prime function, no.

Q. Upon what basis were you paid, and how much?

* * *

A. \$80.00 per week.

Q. With whom did you arrange that salary?

A. Jack Lewis and Joe Levitan. [76]

* * *

Q. (By Mr. Smith): Now, you say that you

(Testimony of Maurice Fellman.)

left your employment at California and went to Trina at a date in about late December; is that correct? A. Yes.

Q. I would like to have you tell me, if you will, what events led to that change in your work and employment. Specifically, now, when did you first have a conversation with either Mr. Lewis or Mr. Levitan concerning such a move and change in your occupation? A. How specific?

Q. Give us your best recollection.

A. I would say it was in December. [77]

* * *

Q. (By Mr. Smith): I think you said you were the one who brought it up. The question was, what was your proposal, if you made one?

A. My proposal was a general one, that Trina Shoe Company manufacture and sell to California Footwear.

Q. At this time did you make any proposal as to where your manufacturing operations would take place? A. Originally, I don't believe I did.

Q. Do you recall when the subject matter of where your manufacturing operations would take place first came up?

A. I would say that it would be a week preceding the move.

Q. And your move was at what date, by your best recollection now?

A. The latter part of December.

Q. So about a week prior to the latter part of

(Testimony of Maurice Fellman.)

December the subject of where you were going to move came up. Did that come up at your instance or at the instance of one of the partners?

A. The proposal to move to Venice?

Q. Yes. [80]

A. I would say at the instance of the partners.

* * *

Q. (By Mr. Smith): At the time that the subject matter of the move to Venice came up, what was said about the move to Venice, and by whom?

A. I don't recall who said it. I was asked if I would move the company from Costa Mesa to Venice.

Q. Is it correct that in the period from October 1 to late December, the Costa Mesa operations were completely shut down?

A. I had no employees during that period.

Q. And there was no production going on during that period in Costa Mesa?

A. I did at little piddling myself. [81]

* * *

Q. (By Mr. Smith): And I take it that oral agreement was reached in late December?

A. Yes.

Q. And that was then reduced to writing in the buy and sell agreement that has already been introduced into evidence in this case? A. Yes.

Q. Now, in these discussions, was there any dis- from your corporation?

(Testimony of Maurice Fellman.)

A. No, I don't believe there was. [82]

* * *

Q. What is your salary at Trina?

* * *

The Witness: \$80.00 per week. [83]

* * *

Q. (By Mr. Smith): Your answer is that without thinking much about it, you continued on your old salary from California?

A. That is correct.

Q. You were satisfied with the \$80.00 and decided to continue to pay yourself the same figure, is that correct? A. That is correct. [84]

* * *

Q. Was Albert Lewis one of the first employees?

* * *

The Witness: One of the first. [85]

* * *

Q. (By Mr. Smith): I withdraw the last pending question and ask you what Albert Lewis' job was with Trina at Venice?

A. Principally in the supervisory capacity. [86]

* * *

Q. (By Mr. Smith): I will ask you whether or not at any time later than the original salary, his salary was increased?

* * *

The Witness: Yes, he got an increase.

(Testimony of Maurice Fellman.)

Q. (By Mr. Smith): I ask you whether, at any time, he draws more salary than you?

A. Yes, he does. [92]

* * *

Q. (By Mr. Smith): * * * When did you or Albert Lewis first conduct interviews for hire at the new plant? A. Probably December.

Q. Who did the hiring? A. Myself.

Q. Did you do all of the hiring in the first few weeks of the company? A. Yes. [93]

* * *

Q. (By Mr. Smith): We have received into evidence a lease that goes to the property in Venice which Trina sublet from California. Now, just to lead up to my next question, I hand you General Counsel's Exhibit 5 and ask you whether the description of the property leased as contained in that lease conforms with the actual practice through the months that the lease was in operation? In other words, did you use and possess the actual premises set out in the sublease, which I have handed to you?

A. I believe we did, in general. [94]

* * *

Q. (By Mr. Smith): I call your attention to the attachment of General Counsel's 5, which is the sublease, and the clause on the last page of the exhibit, which reads, "The front storeroom, the rear office room, and the front office room. Lessee shall have the joint use of the front office room with lessor and shall have the right to use the pedestrian

(Testimony of Maurice Fellman.)

and vehicular entrances on Main Street for its business operations.”

I will ask you now, is that a correct description of the actual provision that has prevailed in the last several months between the two possessions of the two companies? A. Yes.

Q. In the period from January 1, until the present time, I will ask you whether Joe Levitan has spent four work days as a regular thing at the premises now, without distinguishing between [96] what part of this building, has he put a full appearance in each work day at the premises described in the sublease?

Mr. Perkins: I object to the question.

* * *

The Witness: Yes. [97]

* * *

Q. (By Mr. Smith): Do you understand the question? What portion of Mr. Levitan's time was spent within Trina premises?

A. There was one area in the shop that by right of lease belongs to Trina, but it is one that we don't draw lines over, and [99] it is the area in which Joe Levitan spends a greater portion of his time.

Q. What is that area?

A. That area is the supply house and the packing house.

Q. And he spends the greater portion of his time there? A. I would say so.

Q. Now, he also spends time throughout the factory, does he not? A. Yes.

(Testimony of Maurice Fellman.)

Q. On a regular basis, does he not?

A. I couldn't say regular.

Q. I will ask you whether he directs the work of employees in the factory, production employees?

A. He gets his finger into everything.

Trial Examiner Hemingway: Including direction of employees?

The Witness: He is liable to.

Q. (By Mr. Smith): I will ask you what Mr. Levitan's job was at the California plant in the three months that you worked there, if you know?

A. He was, I would say, he was a production man there.

Q. He was in charge of production and Mr. Lewis' job was a larger one in charge of all operations. Wouldn't that be the division between this work at the old plant?

A. From my observation, yes. [100]

* * *

Q. (By Mr. Smith): You seem a little bit puzzled when I asked you about hiring, what function did Mr. Levitan have in hiring—

* * *

Trial Examiner Hemingway: I didn't understand Mr. Smith to be censuring the witness on that. I think it was just that Mr. Smith may not have made himself plain and the witness may have had some doubt as to what he was called upon to answer. I did notice that you questioned the manner in which Mr. Smith had phrased the question,

(Testimony of Maurice Fellman.)

as though, if he had put it in the right way, you might have said Mr. Levitan had something to do with it.

The Witness: That is correct.

Trial Examiner Hemingway: Did he have something to do with employment?

The Witness: I would say that there have been times when either I was absent or preoccupied and people had come in that Mr. Levitan had put them to work. That would be in instances when I had made it known, say, that I was looking for a person to employ.

Q. (By Mr. Smith): In such cases Mr. Levitan put such employees [103] to work without consulting you?

A. It might have been done even before I was consulted about the specific individual, yes. [104]

* * *

Q. (By Mr. Smith): You testified, Mr. Fellman, that your job at California Plant was that of sample maker? A. That is correct.

Q. And you had no other substantial duty?

A. That is correct.

Q. I will ask you whether you didn't make the samples at Trina during most of your employment there? A. Yes.

Q. I will ask you whether or not you were the only sample maker there during that period?

A. That is 99 per cent true, but there were some other patterns made. [113]

(Testimony of Maurice Fellman.)

Trial Examiner Hemingway: I didn't get the period. What period was this?

Mr. Smith: The period I refer to is the entire period from January 1st until the present date.

Q. (By Mr. Smith): In that period, is it your testimony you made 99 per cent of the patterns?

A. That is correct. [114]

* * *

Trial Examiner Hemingway: I would like an explanation of how you happen to be an employee of both companies at the same time.

The Witness: Trina Shoe is a corporation of which I am the sole owner. At that time I was idle. So I went to work at California Footwear, making the patterns, which in itself is not a full-time job, just is a spot job, I would say.

Trial Examiner Hemingway: And that was your occupation between October and December of 1952?

The Witness: Yes. [116]

* * *

Q. (By Mr. Smith): I would like to go into more detail concerning your actual work at Trina. You said you made all the patterns or 99 per cent thereof. Did you sign the payroll checks?

A. Yes.

Q. What else did you do at Trina? [118]

A. Everything that comes under the term of general managership. [119]

* * *

form operations? [120]

* * *

The Witness: Well, you see, I can think of instances in a broad sense where we might have had discussions on how a certain thing, how a certain operation, is performed with the operator on the specific job enmeshed in the discussion.

Whether a thing like that would be direction as you are asking it, I don't know.

Q. (By Mr. Smith): You are talking about a discussion, are you not, occurring at the machine site between you and Mr. Lewis and the operator of the machine? A. Yes.

Q. And that kind of discussion did occur?

A. Yes.

(Testimony of Maurice Fellman.)

Q. And what do you mean by your answer you wouldn't know about Jack Lewis' activity in the plant?

A. Jack Lewis didn't spend a great deal of time in the plant.

Q. I will ask you the time that he did spend in the plant, did he direct individuals in the work that they were performing?

A. I don't recall an instance of direction, unless you define direction a little more narrowly.

Q. Did he tell individuals what to do?

A. I wouldn't know. Possibly how to do it, I mean it's a very narrow road.

Q. Did he instruct individuals on how to per-

(Testimony of Maurice Fellman.)

Q. Who took charge of the plant on days that you were away from the plant for the entire day?

A. Who would be responsible for what phases?

Q. Well, if there were several, tell me their names and what their individual responsibility was.

A. That could have varied. I would say that there might have been times when I asked Levitan to watch out for certain phases.

Trial Examiner Hemingway: Don't say "might have been" if you asked him to do that. [121]

The Witness: Let's put it this way, I know there have been times I did that and the specific times I can't bring to mind.

Q. (By Mr. Smith): They refer to days that you were absent for a full day? A. Yes.

Q. And you asked Levitan to watch out for certain things on such days? A. Yes.

Q. And you asked him to watch out for production on such days, is that right? A. Yes.

Q. And did you have anyone else take charge of any portion of your duties while you have been away?

A. Now, people on the Trina payroll?

Q. I am referring to Trina employees or California employees if that be the case.

A. Well, in that case, there would be a lot of individuals throughout the shop that were given specific instructions to watch over things in their immediate vicinity.

Q. Have you ever asked Albert Lewis to take charge of the plant or some portion of the job while

(Testimony of Maurice Fellman.)

you have been away? A. Yes.

Q. Have you ever asked Jack Lewis a similar question? A. Yes. [122]

* * *

Q. (By Mr. Smith): Who makes the determination that a certain job carries a certain rate of pay? A. I do.

Q. And do you make that determination in all cases? A. Yes.

Q. In every case throughout the ten months' period have you determined what piece rate a certain employee is to draw for a certain operation?

A. Yes.

Q. Now, with respect to increases in rates of pay, if an hourly paid employee makes a request for a wage increase, to whom does the employee normally make application, to you or someone else?

A. To myself.

Q. And do you make an effective decision about that immediately, or do you make further determination?

A. Do I ponder it? No, I don't make immediate decision in every case.

Q. What do you do? A. Ponder it.

Q. Do you also consult with Mr. Jack Lewis? [123]

* * *

A. I don't consult him as to whether the person should get it, if that is what you are talking about, if that is the question.

(Testimony of Maurice Fellman.)

Q. Why do you consult him in such cases?

A. I might consult with Mr. Lewis or with other parties for the purpose of determining a rate.

* * *

Q. I will ask you when you are asked questions about work by an employee about the way to do a job or some question about materials, have there been occasions when you said, "Go ask Joe," [124] or "Go ask Jack," and have not answered the question put to you?

A. I would have to hear the question. There might be an instance where the question might involve the product that I was making for California Footwear, and might entail whether or not the product would carry the material that they required. In that instance it could happen.

Q. There have been cases you said "Go ask Joe," or "Ask Jack"? A. Yes. [125]

* * *

Q. Who determines the amount of pay that piece rate work—strike that.

Who determines the full paycheck payment to piece-rate workers by counting up the tickets and deciding how much is due for that work?

A. The girl in the office.

Q. Do you ever do that?

A. I have done it.

Q. Does Jack Lewis ever do that?

A. There have been times when he has done it.

(Testimony of Maurice Fellman.)

Q. Is it your testimony it is ordinarily the girl in the office who does it?

A. Ordinarily, ordinarily it is myself who does it.

Q. Does Trina have a telephone book listing at 222 Main Street? A. No.

Q. I take it your answer is that no phone is listed in Trina's name in any directory?

A. That is correct.

Q. And you have not an unlisted phone?

A. That is correct.

Q. Is there a phone listed for that address?

A. No, oh, yes, there is a phone listed for that address. [126]

Q. Is that in the name of California Footwear Company? A. Yes. [127]

* * *

Mr. Smith: I would like to read it in. The listing which appears at page 1535 of the directory as identified, is as follows: In bold-faced letters, "Calif. Footwear Co," California is abbreviated, as C-a-l-i-f. Manufacturers, which is abbreviated. "Mfrs. of Slippers, Sandals and Casuals." That is "222 Main, Venice." Venice is abbreviated and following a series of dots is the telephone number, Exbrook 6-5951.

I do not have before me the August, 1952, Los Angeles yellow page directory, but counsel's comment indicates it may be material and at a later point in the record I would like to introduce, to

(Testimony of Maurice Fellman.)

ask the Trial Examiner to take official notice of the entry there which carries the name of the California Footwear Company at the former location, but with a different descriptive comment that is unlike the comment here as to what the company is engaged in at that former location which, I think, is clear evidence that this is not an inadvertent carry-over from a former listing.

Trial Examiner Hemingway: Is it stipulated his reading is correct?

Mr. Perkins: Well, that is no objection that it is correct. [128]

* * *

Q. (By Mr. Smith): Confining your next answer or two to your job during the last two weeks, have you worked full days during the last two weeks at the Venice Plant?

A. I haven't put in full time at the plant.

Q. What portion of your time in the last two weeks have you spent at the Venice plant?

A. The last two weeks, perhaps forty, fifty per cent.

Q. Forty or fifty per cent? A. Yes.

Q. How many days in that period were you away from the plant for a whole day or almost a whole day? A. I would say five days.

Q. During those five days who was in charge of production at the plant?

A. As I say, various assignments were placed in general. Albert Lewis was in charge during that period.

(Testimony of Maurice Fellman.)

Q. And was Joe Levitan in charge on any of those days? [129] A. In a general sense.

* * *

Q. Were any new employees taken on in your absence on any of those days?

A. There were some new ones, yes.

Q. Who did the hiring, if you know?

A. I don't.

Trial Examiner Hemingway: Had you specifically given authority to do any hiring during the time you were away? [130]

The Witness: Yes.

Trial Examiner Hemingway: To whom did you give that authority?

The Witness: To Joe and Albert, of course.

Trial Examiner Hemingway: Was there a standing arrangement for that, or did you specifically instruct them each time you left the plant?

The Witness: No, because in the main we were covered on help. But there were some minor jobs that would require some assistance.

Q. (By Mr. Smith): When you first went into the operation in January of 1953, what was the source of your machinery?

A. When I first went into operation in 1953?

Q. In January of 1953, at Venice, where did you get your machinery?

A. That is the machinery that was on the property at Costa Mesa.

Q. Who arranged for transportation for its moving?

(Testimony of Maurice Fellman.)

A. The actual arrangement of the moving?

Q. Who made the contract or agreement for its transportation, you or Mr. Lewis?

A. I think Mr. Lewis notified the trucking company. I'm not sure, because the trucking company is one that is used quite a bit in the trade.

Q. Was that billed to California and then, in turn, billed to you? [131]

A. Yes.

* * *

Q. I will ask you whether machinery wasn't moved to Venice Plant from the California Footwear?

A. Yes, at a later date.

Q. When did that occur, in January?

A. No, I don't believe so. I believe it was later than that.

Q. Was it in February?

A. I think it was in February.

Q. Was that all the machinery located in the California plant when you left there in December? Was all of that moved over?

A. I don't know if it was all moved over.

Q. Well, was the greater part of it moved?

A. I believe the greater portion was moved, yes. [132]

* * *

Q. (By Mr. Smith): This machinery that was rented, was that from United?

A. Some of it.

Q. And what was from United is now still leased by California at the present time, is that not true?

(Testimony of Maurice Fellman.)

A. That is true.

Q. And, in turn, you are billed for whatever that rental is in connection with the——

Trial Examiner Hemingway: Is that the United Shoe Machinery Company?

The Witness: Yes.

Q. (By Mr. Smith): Is another company also involved in the machinery rentals by California?

A. Yes. [133]

Q. And is it true that the sole dealing that either of your two companies have are dealings by California with that company?

A. On lease and rental equipment.

Q. On the rental equipment?

A. Yes, Trina Shoe Company does not lease any equipment.

Q. And then, in turn——

A. Except those payments to California Footwear for their lease equipment.

Q. You pay the precise amount of rental that you pay to California who has the lease arrangements with each of these two companies?

A. Yes.

Q. And those are lease arrangements that are continuations held at the Los Angeles location of California?

A. Yes. [134]

* * *

Trial Examiner Hemingway: On the record.

Are you prepared to make your stipulation?

Mr. Smith: Yes, you go ahead, Mr. Perkins.

Mr. Perkins: Yes.

The following facts are stipulated to. I must say, I wasn't able to reach Mr. Fellman during the recess but I collected information elsewhere. If there is any mistake here, I will undertake to inform the Examiner and the government counsel promptly. This is based on the best information I can get. These are instances in which, I gather, the counsel for the government wants to show that the personnel practices at Trina Shoe Company differed from those which had formerly been in force with California under California's contract with the union.

First, the minimum hiring-in rate paid by Trina has been 75 cents an hour. Now, that doesn't mean that everybody was hired in by Trina at that figure. Some received more, but there were some who received as little as 75 cents an hour when hired in by Trina.

Trial Examiner Hemingway: Was that for inexperienced help?

Mr. Perkins: I gather so, yes.

The minimum hiring-in rate at California under labor [148] contract has been, I believe, 80 cents an hour. The 75 cents minimum hiring-in rate paid by Trina at Venice operation was the same minimum rate which had prevailed at Trina at Costa Mesa operation in 1952.

All right so far?

Mr. Smith: Yes, that is agreed to.

I just want to make this comment about the Costa Mesa rate. We stipulate to the fact, but take the position that any information within his stipu-

lation relating to Trina at Costa Mesa involving pay practices and working conditions is wholly immaterial in this action. With that comment, I agree to the stipulation.

Mr. Perkins: We will have an objection as to the materiality of the whole thing, probably.

Trial Examiner Hemingway: I will receive the stipulation.

Mr. Perkins: Now, next item under the labor contract enforced covering the operations of California Footwear, at least, toward the latter part of the operations of California Footwear there was added an amount of 13 cents an hour, termed a cost-of-living bonus to the wages of employees, including the piece-rate earnings of employees. That was a 13-cent flat increase added to piece-rate rate earnings.

Trial Examiner Hemingway: That was 13 cents to each employee, regardless of the category, not an average of 13 cents?

Mr. Perkins: It was to each employee and that was a [149] provision of the union contract covering California. Trina has not paid any such so-called cost-of-living bonus, in its operation at Venice. Neither did it pay any such amount in its operations at Costa Mesa.

Mr. Smith: That is agreeable with one or two corrections. The 10 cents was added in September of 1951 and the added 3 cents in October of 1952, rather than in a single lump sum.

Trial Examiner Hemingway: You will accept that?

Mr. Perkins: That is all right, if that is what it was.

If you are going to put in a copy of the old contract, why don't you——

Mr. Smith: Only in the most recent instances, I am not sure how much of this is clear in that contract.

Mr. Perkins: Trina never paid the dime nor the three cents, nor did it pay the 13 cents at Costa Mesa.

Mr. Smith: A second point, I may have misunderstood, but I understood this applied to piece-rate workers. The fact of the matter is it applied to piece-rate workers and hourly paid workers, but only those hourly paid workers receiving more than 95 cents per hour.

Mr. Perkins: Except Trina didn't pay the 13 cents, the 10 cents and the 3 cents, in any form.

Trial Examiner Hemingway: Something Mr. Smith said seems to alter the stipulation as I understood it. I thought the 13 cents was across-the-board to each and every employee, [150] regardless of what he was doing. Just now he said it was given to employees who received over 95 cents an hour. Does that modify it?

Mr. Smith: That is our understanding of what the practice was.

Mr. Perkins: You are talking about the union contract.

Mr. Smith: That's right. The practice under the contract.

Mr. Perkins: That wasn't——

Mr. Tutt: Could I explain?

Trial Examiner Hemingway: Why don't you talk this over off the record?

Off the record.

(Discussion off the record.)

Trial Examiner Hemingway: On the record.

Do you want to explain what was stated off-the-record, if you accept that as a part of your stipulation?

Mr. Perkins: The stipulation with reference to the 13 cents addition, 13 cents hourly addition, is modified so as to show that under the labor contract prevailing at California for the latter part of its operations, that was not paid to persons classified as apprentices.

Trial Examiner Hemingway: And were there apprentices who were receiving less than the 95 cents rate?

Mr. Perkins: I don't know. There's your experts.

Mr. Smith: No, we suggest the stipulation there were none. [151]

Mr. Perkins: That is acceptable.

Mr. Smith: The stipulation is agreeable in its present form.

Trial Examiner Hemingway: Are you through with that now?

Mr. Perkins: We have several other points.

Under the labor contract enforced in California's operations, employees of three months or more experience in the industry were to receive a minimum

of 95 cents. Under Trina's operations, that minimum wasn't paid for experience in the industry. It is our information that Trina did pay that much to anyone who was three months at Trina.

Mr. Smith: That is agreeable.

Mr. Perkins: Next, in Trina's operations in Venice, it did not pay reporting-in pay to persons who—and, say, to anyone unless he had been specifically instructed to report in and in all such cases it is our information that the employee was given at least a half-day's work. As to the practice formerly prevailing at California, I don't know that I could state that and I think it would—my suggestion would be that when you get the contract in, let it speak for itself.

Mr. Smith: That is agreeable.

Mr. Perkins: I want to add to that that Trina's practice in Venice was the same as it was in Costa Mesa.

Trial Examiner Hemingway: In this latter respect?

Mr. Perkins: Yes. [152]

Next item is that Trina did not pay time-and-a-half for daily overtime. That is to say, any time worked over 8 hours in one day, nor has it paid time-and-a-half for Saturday work, as such. That is to say, it hadn't paid time-and-a-half for Saturday, without regard to the time already worked during the week. As to holidays, Armistice Day was worked by Trina and has not been paid for, but will be paid for at straight time. I don't mean to say that what happened on Armistice Day is char-

acteristic of what is done on holidays, but, at any rate, that did exist and will exist with respect to Armistice Day. There have been other holidays which have not been worked by Trina.

Trial Examiner Hemingway: I assume that Armistice Day is not regarded as a holiday by Trina, is that correct?

Mr. Perkins: At least it hasn't been treated as such this year. I should say, by way of explanation, Mr. Examiner, in these smaller companies the personnel policies are not that regular or posted fashion of the kind you will find in larger companies. You will ask what the policy is and about all you can do, or they can do, is to tell you what they have done.

Trial Examiner Hemingway: Including any statement as to what Trina had done at Costa Mesa on that?

Mr. Perkins: I am unable to give that information. At any rate, at Costa Mesa, Trina wasn't under union contract and [153] had no obligation—excuse me. I will withdraw that. I can make a statement with respect to daily overtime and Saturday penalty time. Trina paid neither of those at Costa Mesa. I am unable to say what the holiday practice was. I assume since the employer wasn't under contract that required penalty time, it didn't pay it unless it wanted to for some reason. [154]

* * *

Now, the vacation plan under the union contract prevailing at California Footwear is rather compli-

cated and I would suggest that the contract speak for itself when it is introduced. [156]

Mr. Smith: Agreeable.

Mr. Perkins: With respect to the practice at California Footwear.

The next item is that, at Venice, Trina has provided health and welfare benefits for employees, but not as part of the multiple employer plan enforced under the union contract which was applicable to California and in which, I believe, a number of other employers participated. Further, that the premiums, amount of premiums, paid by Trina were less in amount; that is, less per employee per applicable period than would have been payable under the union contract. [157]

* * *

Mr. Perkins: We can cover July 4th, at least, and cover Decoration Day later on, as soon as I get the information.

I wish to restate our stipulation with respect to Trina's handling of Decoration Day and July 4th. It is agreed that what Trina did in 1953 with respect to July 4th, which was a day not worked, was to pay straight time for that day to persons who had then been on Trina's payroll three months or longer. The practice prevailing under the California Footwear contract will be shown by the contract when it is placed in evidence, as far as July 4th is concerned. We will, as soon as we get additional information, we will try to enter a further stipula-

tion with respect to what was done on Decoration Day, 1953.

Mr. Smith: That is agreeable.

Trial Examiner Hemingway: Does that complete your stipulation?

Mr. Perkins: Yes. [158]

* * *

JACK LEWIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Hemingway: Is that your full name, Jack Lewis?

The Witness: That's right, Jack Lewis.

* * *

Direct Examination

By Mr. Smith:

Q. I understand you are the Jack Lewis who is a co-partner in the California Footwear Company?

A. Yes, sir.

Q. It appears through the pleadings in this case that, at least at the time they were filed, this was an equal co-partnership between you and Mr. Joe Levitan?

A. That is right.

Q. I will ask you whether that is the situation which prevails today?

A. Yes, sir.

Q. I will ask you whether Mr. Albert Lewis, your son, has [161] any interest in the business?

A. No, sir.

(Testimony of Jack Lewis.)

Trial Examiner Hemingway: That is Albert Lewis?

Mr. Smith: Yes.

* * *

Q. (By Mr. Smith): What was the monthly rental for California's premises in Los Angeles during the last year of your occupancy there?

A. \$288.00 a month.

* * *

Q. (By Mr. Smith): Am I right in assuming you occupied all the premises you rented there, and did not sublease any part of those premises? [162]

A. Not in the last year, no. [163]

* * *

ERNEST TUTT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Hemingway: State your full name, please.

The Witness: Ernest Tutt.

Trial Examiner Hemingway: Your home address?

The Witness: 7822 LaSalle, Los Angeles 47.

Direct Examination

By Mr. Smith:

Q. What is your job or occupation?

A. I am the organizer for the United Shoe

(Testimony of Ernest Tutt.)

Workers of America Affiliated with the Congress of Industrial Organizations. I am assigned to Local 122 at 617 Venice Boulevard, Los Angeles 15. [166]

* * *

Q. Did you have any later conversation with Mr. Lewis about Mr. Fellman?

A. Sometime during the latter part of the year, which I believe was in December, I noticed that Mr. Fellman was no longer in the factory and I did go over to Mr. Lewis on one of my visits to the factory in December, during the month of December, and asked him why Mr. Fellman wasn't there any longer, that I hadn't noticed him around there recently. His answer to me was that he had to leave Mr. Fellman go because he wasn't doing his job properly.

Q. In the next month, that of January, 1953, did you make any trip to the Los Angeles plant of California?

A. Yes, during the first few weeks of January a number of the employees of California Footwear Company had mentioned to me that they heard that the shop was going to shut down and [172] that another shop was going to open up in Venice, California.

When a number of those rumors came to me, or statements came to me, I thought it might—I thought it my duty to go to Mr. Lewis and talk to him regarding the situation to see if there was any foundation to it that the shop was going to cease

(Testimony of Ernest Tutt.)

operations on Los Angeles Street. On January 20th I made a visit to the California Footwear Company and I told Mr. Lewis of the statements which had come to me from a number of workers, saying that the shop was going to shut down. I asked him if there was any truth to these statements.

He said, yes, the shop was going to shut down. He said he was going out of business. I asked him why such a decision was made. He told me that his doctor had told him that he had an incurable spinal disease and that his doctors told him further that he should definitely cease having anything to do with operating or running a shoe factory.

I told him, of course, that I was sorry to hear this. I went on and asked him if his decision, however, had anything to do with the union or the contract or anything at all connected with the union, and he said no, it didn't. He said it was strictly based on doctor's orders that he could no longer stand the strain and aggravation of operating and running a shoe factory.

I asked him where this factory in Venice was going to be located, as I had heard that a factory was opening up down there. [173]

He told me this factory was going to be owned and run by Mr. Fellman who had previously worked for him. I asked him for the address of the shop, which he readily gave me. He mentioned, I told him that I was anxious that as many of the employees of the California plant would be re-employed at Venice plant as was possible. He told me

(Testimony of Ernest Tutt.)

he had nothing to do whatsoever with the hiring or running of the Venice plant, and that I would have to see Mr. Fellman and talk to him about that.

I also asked him if he had any idea what Mr. Fellman's reactions might be towards continuing the new contract—recently signed contract.

He said, again, that he didn't, that I would have to talk to Mr. Fellman about that. Now, as I recall, that was the sum and substance of my conversation with him on that particular day. [174]

* * *

Q. (By Mr. Smith): In the period that followed January 20th, did you have any occasion to visit the Venice site of Trina?

A. Yes, I did.

Q. When was your first such visit? [175]

A. My first visit, it was on January 27th.

Q. Who was present at that time?

A. I was accompanied by Mr. George Knapp.

Q. Identify him.

A. Business agent of Local 122, United Shoe Workers of America, C.I.O.

Q. Go ahead and tell us who was present at the conversation and what was said.

A. We went into the factory and observed Mr. Fellman in the shop. We went over and shook hands with him. We noticed, of course, the factory was just beginning to be set up. There was, I believe, three or four or five employees working there. We told Mr. Fellman that we were anxious to con-

(Testimony of Ernest Tutt.)

tinue the collective bargaining agreement that we had with the California Plant and we presented him with such a copy.

Q. You used the expression "we." Indicate who. A. Mr. Knapp and myself.

Trial Examiner Hemingway: Who was speaking?

The Witness: I was speaking.

I presented him with a copy of the contract and he suggested that we come back a little later so that he could discuss the matter with us further. Whereupon, we left the shop.

Trial Examiner Hemingway: No date set?

The Witness: No.

Q. (By Mr. Smith): Did you make another visit to the Trina [176] plant, and if so, when?

A. Yes, in early February, on February 9th, to be exact, Mr. Knapp and I again visited the plant.

Q. Will you go ahead, what conversation took place, if any, who was present and what was said?

A. Again, we approached Mr. Fellman. I asked him if he had a chance to look over the contract provisions of the contract which I had left with him, and he said, yes, he had. He did ask us a few general questions about the agreement, such as rates of pay on the minimum wage and he brought up the question of the wage structure and he said you can see that things are still in a raw state at the moment in the shop and we are not producing many shoes. He asked what kind of provision, if any, could be worked out on the wage section in lieu of

(Testimony of Ernest Tutt.)

the piece rates which had been in effect on some of the jobs at the California plant.

I told him that the union had made agreements with other employers in this area which had provided for a temporary wage structure on agreed-upon hourly rates and that we would be agreeable to working out such a temporary wage structure with him as we had worked out with other manufacturers. He didn't say yes or no, but we pressed him for a definite answer as to when we would hear from him on his disposition towards our proposition that the contract be continued or be reinstated, whichever term or phrase you want to use. [177]

Now he did tell us——

Trial Examiner Hemingway: It isn't what we want to use, you state what you want to use.

The Witness: Well, we asked him, of course, pressed him for an answer as to whether he would be willing to continue or reinstate the California contract. He promised me that he would notify us by February 13th as to what his answer would be. So thereupon we left the factory.

Q. (By Mr. Smith): Did you hear from him in accordance with this statement?

A. No, we never heard any more from him at that time, on February 13th or thereafter.

Q. What was the date of your next meeting, if any, to the Venice plant?

Trial Examiner Hemingway: Excuse me, just one moment.

(Testimony of Ernest Tutt.)

Was it made plain to you how he was to notify you?

The Witness: Well, yes, it was. He was to call us, call me at our office. He had our phone number. As a matter of fact, we had already given him that information on our first visit to the shop in late January.

Q. (By Mr. Smith): What was the date of your next meeting or visit to the Venice plant?

A. Our next visit to the Venice plant, again Mr. Knapp accompanied me, was on March 18th.

Q. Go ahead, explain what conversation, if any, occurred; [178] who was present and what was said.

A. I might say by preface that prior to that meeting I had prepared a statement on union recognition which I intended to present to Mr. Fellman. We went down to the factory on March 18th and I presented him with this statement and asked him to sign it.

Q. I now hand you General Counsel's No. 14 for identification; and can you tell me what that is, if you know?

A. That is a statement, or a letter agreement, which we presented to Mr. Fellman and asked him to sign it.

Now, do you wish me to read this?

Q. No. Did he sign it?

A. He looked it over, read it quite carefully, of course, and he asked me the question, "Is it legal for me to sign this?" I said, "Yes, it is," and, "we

(Testimony of Ernest Tutt.)

wouldn't knowingly give you anything to sign which wasn't legal.'" So he said yes, he didn't see anything wrong with it. So he reached in his pocket, got a pen, and signed it Maurice Fellman, President of the Trina Shoe Company.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

Q. (By Mr. Smith): Will you go ahead and explain what else was said in this conversation, if anything?

A. After he signed it, then I told him that we would be in a position in the near future where we might be able to sit [179] down and negotiate a contract with him as soon as we could prove that we represented a majority of production employees. That was the conclusion of the meeting and we then left. [180]

* * *

Q. (By Mr. Smith): Now, will you continue with what was said at the meeting on March 24th at the Trina plant?

A. At the meeting held on March 24th, I presented this letter to Mr. Fellman and with a list which was written in the letter and also which I had in my hand, a list of pledge cards and union dues cards. I believe there were 12 union pledge cards which had been signed by employees of Venice plant and five dues cards. We told him that, based

(Testimony of Ernest Tutt.)

upon the payroll which he had given me the previous day, we therefore had a majority of the employees signed up, either on union dues cards or pledge cards. [185]

* * *

Q. Will you proceed and give us the details concerning General Counsel's 15-A, the 16 group and the 17 group, with respect to what you did with them, what was said with respect to them and other details in the meeting on March 24th?

A. I presented the letter dated March 24th to Mr. Fellman. He read the letter over. We then told him that I had the pledge cards and dues cards with me and that he could look them over to verify that they were the same names, individuals' names which appeared in the letter. He thumbed through the pledge cards and made no comments, and then he asked to see the dues cards and I gave him these five cards. He looked through them and he took one of the cards out.

Q. Can you identify which one that was?

A. He took a dues card out which belonged to Annie Bell Stamps.

Q. May we have the number of that particular card, that is the exhibit number I am referring to.

A. Annie Bell Stamps is 17-D.

Q. Will you continue, please?

A. He picked the card out and sort of waved it in his hand a [187] minute back and forth, and he said, "I will be back in a minute."

So he went into the factory from the office where I was talking to him, where Mr. Knapp and I were

(Testimony of Ernest Tutt.)

talking to him, and he returned in a couple of minutes and said, "I can't recognize this dues card." And I asked him why and he said, "She tells me that she's not a member of the union any more." I said, "Well, there is the card. She is still a member of the union. She has never withdrawn or quit, withdrawn or resigned from the union."

So, he said, "No," he didn't think he could recognize that card. I told him that he had agreed to recognize the dues cards and pledge cards which we had presented to him, but he kept stating that he could not recognize this one card.

Finally, I said, "Well, you're wrong in your assumption that she's not a member of the union, but," I said, "let's take this card out and confine ourselves to the other pledge cards and four dues cards remaining." He said, no, he said, "I feel that the other dues cards aren't legitimate, either."

I asked him which ones, in his opinion, were not legitimate, and he gave me no answer as to which ones, in his opinion, were not considered legitimate. So I asked him if he didn't intend to fill out the agreement which was made and which was signed by him the previous week. All I could get from him was the answer that he could not recognize the one dues [188] card and the other dues cards, generally.

So, with that, we left the office and the meeting was at an end. [189]

* * *

(Testimony of Ernest Tutt.)

Q. What was the date of your next visit to Trina plant, if any?

A. The date of the next visit was March 31st. I was accompanied [202] to the plant at that time by Mr. Frank Roth.

Q. Will you go ahead and explain who was present at any conversation and what was said?

A. We went in the company office, Mr. Roth and I. I asked to see Mr. Fellman, who came in in a few moments and I told him that the union again had a majority, we thought we had a majority of employees who had signed pledge cards, only. At this time we were not going to go into the dues cards, but that we would rely solely on pledge cards.

I asked him to give me a list of his present employees, and I asked him how many people were on the working force. He answered and said 1624. I thought he was joking and I said, "Now, look, Mr. Fellman, we have the pledge cards here; in order to determine whether we represent the majority, we have got to have the list of employees on the payroll." So, again, he answered 1624. I reminded him that he had signed an agreement just a couple weeks prior to that time in which he stated that he would recognize the union as a bargaining agent if we could show that we represented the majority. I asked him if he wanted me to read that agreement to him. He said, no, he knew perfectly well what was in the agreement.

I asked him if he intended to live up to that agreement and carry it out. He answered and said,

(Testimony of Ernest Tutt.)

“No, I don’t like your antagonistic attitude when I met with you last week.”

I said, “Well, I didn’t like your attitude either, but [203] that is beside the point. We should try and carry it out, the agreement.”

He again refused to give me the list of employees. When it became apparent that he wasn’t going to co-operate, we left the meeting. That was the conclusion of it. [204]

* * *

Q. Did you hold any subsequent meetings with Mr. Fellman?

A. In the early part of April, April 7th, to be exact, a meeting was arranged with Mr. Fellman in the office of Mr. Adolph Koven, I believe that is K-o-v-e-n. Mr. Koven is a conciliator with the State of California Conciliation Service, and he had contacted me and also Mr. Fellman prior to April 7th and asked if we would be receptive to a meeting. The answer was yes, and such a meeting was arranged for April 7th. [206]

Q. Was anyone present besides you three?

A. No one else was present.

Q. Will you go ahead and tell what was said and by whom? [207]

* * *

A. * * * Mr. Koven suggested that Mr. Fellman and I have lunch together and see if we couldn’t come to some understanding, or, at least, have an exchange of views further on the situation, which we did. We went out and had lunch together. During the

(Testimony of Ernest Tutt.)

close of this lunch period, Mr. Fellman brought up a couple of items relative to the contract. One objection which he raised, and I had asked him what objections he had towards signing the contract, one objection he raised was that he didn't want to sign the California Footwear contract, that the factory in Venice was now known as the Trina Shoe Company. I said, "Obviously, if you sign the contract, the name of the [208] contract will be changed. Instead of reading as a contract between the California Footwear Company and the United Shoe Workers, it will now become known as Trina Shoe contract made with the United Shoe Workers."

Another item which he raised was in regard to the seniority clause. He said it was his understanding that the seniority exception in the agreement called for job seniority, that under the seniority clause it wouldn't be possible for him or for the company to place a worker on more than one job. I told him that that was utterly untrue. That the union recognized a number of smaller shops and I pointed out to him that we had quite a few shops as small and, in some cases, smaller than Trina or California Footwear, and in those cases the union recognized that it was necessary for a worker to perform two, three, four, five and sometimes even a half-dozen different jobs in order to have a day's work, and the contract would be no bar towards him giving a worker more than one job to do. I told him if it satisfied him further that I would be will-

(Testimony of Ernest Tutt.)

ing to agree to further clarification of that seniority section.

With that, we returned to Mr. Koven's office and we resumed our discussion. I told Mr. Koven of some of the discussion which had been going on between Mr. Fellman and myself during the lunch hour, and I told him the circumstances, I told Mr. Koven further, Mr. Fellman, of course, was sitting [209] there listening to everything that was going on, and I told Mr. Koven further than Mr. Fellman had raised two objections which we had, as far as I knew, had been straightened out, and, therefore, since there was no other objections raised by Mr. Fellman, I didn't see why we couldn't sign a contract and settle these questions.

Mr. Fellman then spoke up and said, "Well, there is a number of other things which I don't like in the contract."

I asked him what they were and he said, "Well, I will have to study the contract. I don't know, right now, but there are some other things I don't like."

I told him we are just not going to change each and every little thing in the contract to suit him. We have had this contract at California Footwear downtown and there was no questions in regard to seniority that was ever raised and I said we didn't intend to change all of these other things in the agreement to satisfy you, because you can't even tell me now what the changes are that you have in mind.

(Testimony of Ernest Tutt.)

So with that the meeting came to an end. [210]

* * *

Q. (By Mr. Perkins): Did Oster serve as a steward at Trina? A. Yes, he did.

Q. How was he selected?

A. Selected by myself.

Q. And was there any other steward at Trina during the time you say Oster was a steward there?

A. No, there wasn't.

* * *

Trial Examiner Hemingway: Well, I think that might be [272] a little more intelligible if we knew when Oster became a steward at Trina.

The Witness: Well, it would be sometime during February. I don't know whether I have the exact date or not. [273]

* * *

ANNA C. CHERRY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [283]

Direct Examination

* * *

By Mr. Smith:

Q. Have you ever been employed by Trina Shoe Company? A. Yes, I was.

Q. What was the approximate date of your first day of work with the company?

(Testimony of Anna C. Cherry.)

A. Well, I think it was around the 1st of March. I am not sure, but I think it was.

Trial Examiner Hemingway: This year?

The Witness: That's right.

Q. (By Mr. Smith): Will you tell us the events in connection with your being hired?

A. Well, I went there and I walked in the office and Mr. Lewis was sitting there in the office.

Q. Was that Mr. Jack Lewis, or——

A. Jack Lewis was sitting in the office. I asked him about a job, and he said, "Wait a minute." So he goes back into the plant and sends Joe Levitan out; and, of course, Joe was the one that hired me.

Q. When Joe hired you——

Mr. Perkins: I move to strike the sentence "Joe hired me," as a conclusion. [284]

Trial Examiner Hemingway: Well, just state the conversation, what he said to you.

Q. (By Mr. Smith): First of all, who was present with Joe and yourself, and anyone else?

A. That I don't remember; whether it was just the two of us or whether Mr. Lewis came back. I don't remember.

Q. Will you state whether Mr. Fellman was in the room, if you know?

A. Not that I remember.

Q. Will you state what was said and by whom?

A. Well, I don't know just what was said, but, anyway, Joe told me that he could use me. And it

(Testimony of Anna C. Cherry.)

was around 10:30, and asked me if I could come back at noon.

Q. Afternoon?

A. Yes, prior to lunch, and go to work.

Q. And did you so return?

A. I did. I went home and came back and went to work. [285]

* * *

Q. While you were working in cutting straps who directed you in your work?

A. Well, Joe usually came around and tell me what to do.

Q. Is that Joe Levitan?

A. That is right, Joe Levitan.

Q. Did anyone else direct you in your work?

A. Yes, sir, sometimes Joe Levitan say, "I know what I want you to do, but I don't know how it is done." So he get Mr. Fellman and bring Mr. Fellman and Mr. Fellman show me how he want it done.

Q. Did you have any conversations at any time during this period from early March until April 2nd with Mr. Fellman wherein the union was mentioned?

A. Well, yes. A couple of days before I was discharged, it was either Tuesday or Wednesday—

Q. Now, would that be either Tuesday the 31st of March or Wednesday the 1st of April?

A. No, of March.

Trial Examiner Hemingway: Well, Wednesday

(Testimony of Anna C. Cherry.)

of that week would be the 1st of April. Is that the one you are talking [286] about?

Q. (By Mr. Smith): Are those the dates you are referring to?

A. Well, yes. He came around to me when I was washing my hands and asked me what I thought about the union, and I didn't answer him.

Trial Examiner Hemingway: Was there anyone else there?

The Witness: No, there wasn't. I didn't answer him. And he went ahead to say that the union was no good, that they wouldn't do anything for us, and that the union could close the shop down and then everyone would be out.

Q. (By Mr. Smith): Did he say anything, or did you say anything else?

A. No, I didn't. I just walked away.

Q. Did that end the conversation?

A. That ended the conversation. [287]

* * *

GERTRUDE SMALL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows [298]

Direct Examination

* * *

By Mr. Smith:

Q. While you were employed by the company was there held any general meeting of employees

(Testimony of Gertude Small.)

where the subject of the union came up, on the company premises?

A. Yes, there was, sir. One afternoon, I think the meeting was scheduled for 3:30, if I am not mistaken, and Mr. Fellman spoke.

Q. Before we get to the meeting itself, did anybody direct you to go to the meeting?

A. Well, we were told that there was going to be a meeting, and right around my work bench. They all gathered in the packing room.

Q. Who was present at this meeting? [299]

A. All the employees, and Mr. Fellman and Mr. Lewis.

Q. Mr. Jack Lewis? A. Yes; and Joe.

Q. Was Mr. Albert Lewis there?

A. Yes, sir.

Q. All right. Will you proceed to tell us what occurred, and what was said, and by whom?

A. Well, Mr. Fellman spoke and spoke about the union and said something about the union couldn't do much more than what they were doing, and the union promises one thing and they just don't do it—well, a lot of that stuff, about 15 or 20 minutes of it. [300]

* * *

BLANCHE ROARK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Hemingway: What is your full name, please?

The Witness: Blanche Roark. [308]

* * *

Direct Examination

By Mr. Smith:

Q. Were you ever employed by California Footwear Company at their Los Angeles address?

A. Yes, I was.

Q. And for what period of time were you there employed? A. About three years.

Q. From when to when?

A. Well, that would be from 1950 to the first part of '53.

Q. And what was your work in that period?

A. Platform stitcher.

Q. Did you perform that work throughout that period?

A. No. I guess about the first year I worked there I was a sock stitcher.

Q. During the last two years you worked as a platform stitcher? A. Yes.

Q. During early 1953, did you learn of the fact that the company was beginning operation in Venice?

A. Well, it was rumored around the shop, but we didn't know anything different ever told to us

(Testimony of Blanche Roark.)

that they was going to operate one. But it was rumored around the shop.

Q. As a result of your hearing those rumors did you have any conversation with anyone concerning employment?

A. Well, I talked with Mr. Fellman, and I asked him——

Q. Where did this conversation take place? [309]

A. It was at my machine at California Footwear, on Los Angeles Street.

Q. And about when did it take place?

A. It was around the last of December, or the first of January; somewhere in there.

Q. And was anyone else present besides you two?

A. No.

Q. What was said, and by whom?

A. Well, the conversation came up about this, he was going back in business, Mr. Fellman, and so I asked him about a job, and he said, "Probably I can use you later on." And that is all he said.

Q. Now, did you have any later conversation with Mr. Fellman, or any other person, concerning work in Venice?

A. Well, Mr. Tutt and Ed Morris and Ruth Morris, we went down in the Venice plant about February the 9th, I think, somewhere around there, and I went over to Mr. Joe Levitan and asked him if I could have my job back, and he said, "Go see Maury." So I went over and talked with Maury.

Q. You refer to Maury Fellman?

A. Yes, Maury Fellman.

(Testimony of Blanche Roark.)

Q. Who was present in your conversation with Mr. Fellman?

A. I think Ruth Morris was there.

Q. Will you tell who she is?

A. Well, she worked at the California [310] plant.

Q. Anyone else present?

A. No, that is all.

Q. Go ahead and tell us what was said, and by whom?

A. Well, I asked Mr. Fellman about the job, and he said, "Probably I can use you later on." He says, "I will call you." I think that is on a Thursday or Friday, and he says, "I will call you on Saturday morning and let you know when you can come to work."

Trial Examiner Hemingway: You mean, were you talking with him on Friday and he said he would call you on the next day?

The Witness: I am not sure—it was Thursday or Friday.

Trial Examiner Hemingway: And he said he would call you on the Saturday of the same week?

The Witness: Yes.

Q. (By Mr. Smith): Did you hear from Mr. Fellman by the next Saturday?

A. No, I didn't hear from him. I waited until around noon, and he didn't call, so I phoned him.

Q. And what was said?

A. And he said, "Well, I can't use you right now; but I'll call you later."

(Testimony of Blanche Roark.)

Q. Did you ever hear from him later?

A. No, I didn't hear any more from him.

Q. Did you hold any position in the union at any time that [311] you worked for California?

A. Yes, I was shop steward.

Q. Were you the chief shop steward?

A. Yes.

Q. And through what period of time did you hold that position?

A. Well, that was the year of '52.

Q. And did you hold that position during the last several months of your employment at California?

A. I did. [312]

* * *

Q. Now, you have received a letter from Trina about going to work out there, haven't you?

A. Yes, I have.

Q. When was that?

A. About two weeks ago.

Q. And did you go back?

A. No. But I called them.

Q. What did you tell them?

A. I told them, I asked them about the job, and he said I could come back to work——

Q. He said you could? A. Yes.

Q. But you haven't gone back?

A. No. [313]

* * *

Q. Did you see any platform stitching done when you went out to see Mr. Fellman?

(Testimony of Blanche Roark.)

A. Yes.

Q. Lou Oster was doing it, wasn't he?

A. I don't know the name, but I know it was a man.

* * *

Q. You don't know whether or not the man who was doing the job at Venice was a Union member or not?

A. No, I don't know.

Q. Or whether he was the union steward? [317]

A. No, because I wouldn't know that. [318]

* * *

Trial Examiner Hemingway: Now, if I recall the testimony correctly you worked at California to approximately the end of January of this year?

The Witness: Yes, I did.

Trial Examiner Hemingway: And then how long after that was it that you first went to Venice?

The Witness: I went to Venice around in February.

Trial Examiner Hemingway: I mean, how long after that was it, a week or two weeks, or what?

The Witness: I guess about a week.

Trial Examiner Hemingway: And it was on a Thursday or Friday?

The Witness: Yes. [321]

Trial Examiner Hemingway: I'd like to hand you a calendar and see whether or not you can fix it any better from that.

The Witness: Well, I think it was around about the first week in February.

(Testimony of Blanche Roark.)

Trial Examiner Hemingway: That would make it either February 5th or 6th.

The Witness: Yes, right around in there. I am not certain of those dates, definitely certain of the dates. [322]

* * *

ETHELIN SMITH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [323]

Direct Examination

* * *

By Mr. Smith:

Q. Now, with respect to the first time that you worked, I'll ask you what was the date that you first went to the company to seek employment?

A. I can't remember the date of that.

Q. Tell us about when it was?

A. I think it was in April. I am not sure, but I think it was in April.

Q. And who did you talk to, if anyone, at that time, about going to work?

A. Well, we happen to be down in that way, so we——

Q. Who do you mean by "we"?

A. Charlotte and myself.

Q. Charlotte Parker? A. Yes.

Q. Go ahead.

A. So we saw this ad "Help Wanted." So we decided we stop in and see. So we went in there and

(Testimony of Etheline Smith.)

we talked to the secretary, I guess who it was, the woman who was in there, and she called Joe. And so we talked to him. So he decided that Charlotte comes back at that time, next day. So she [324] went back the next day and went to work. So about a week later he told her to tell me to go back. But I never did go back.

Q. You didn't go back at that time, but you say you did go back to the company on about May 18th?

A. Yes.

Q. And what happened at that time?

A. Well, he called me——

Q. Who is "he"?

A. Joe called me. So I went back down there.

Q. Do you mean by calling you, did he telephone you?

A. Yes. And so I went down there and he put me to work the same day that I went down there.

Q. And you worked for two weeks that time, is that correct? A. Right.

Q. What kind of work did you do?

A. First I was cleaning shoes, and then they put me to cementing shoes.

Q. Now, during this two week period who told you what to do and gave you instructions about your work?

A. Joe. He always done that.

Q. Did Mr. Fellman ever give you any instructions about your work? A. No.

Q. Did he talk to you at all on any occasion?

(Testimony of Etheline Smith.)

A. No. [325]

Q. Did Mr. Jack Lewis ever talk to you about your work?

A. No; only one time he said that I wasn't doing it quite fast enough. So he showed me how to do it faster.

Q. Now, why did your work end at the end of two weeks?

A. Well, Joe told me that the work that I was doing was caught up, and so he told me I didn't have to come back the next day, and that he would call me later on.

Q. Did he call you at a later time?

A. No, not until this last past three weeks that I went back.

Q. But he did call you three weeks ago?

A. Yes.

Q. And you went back to work again?

A. Yes.

Q. Now, you said you worked three days this time. Who directed you or told you what to do in this period of time? A. Joe did. [326]

* * *

CHARLOTTE PARKER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [331]

Direct Examination

* * *

By Mr. Smith:

Q. Have you ever been employed by the Trina Shoe Company in Venice? A. Yes.

Q. And what period of time did you work there, beginning when and ending when?

A. I started around April the 6th or 8th——

Q. And you are still working there?

A. Yes.

Q. Was there part of that time that you were laid off, or not working? A. Yes.

Q. Now, will you tell us about your first visit to the plant seeking employment, when was that?

A. That was in April.

Q. Was that the same time as you were employed? A. Yes.

Q. And you said that was about April 6th or 8th? A. Yes.

Q. Who did you first talk to when you entered the plant? A. Joe.

Q. Was anyone with you as you went into the plant? A. Etheline and I. [332]

Q. Is that the girl who just testified?

A. Yes.

Q. And who did you first talk to? A. Joe.

(Testimony of Charlotte Parker.)

Trial Examiner Hemingway: Is that Joe Levitan?

Q. (By Mr. Smith): Is that Joe Levitan?

A. Yes.

Q. In this conversation, or later this day, did you talk to Mr. Fellman? A. No.

* * *

Q. All right. Will you go ahead and tell us what was said?

A. The first day I went in he wanted to know did someone tell me about the job, and I told him I saw the sign in the window. So he talked to Etheline and I and told me to come back the next morning. That was the end of the conversation. I came back the next day.

Q. You came back the next morning. And who put you to work? A. Joe.

Q. Now, on this day did you talk to Mr. Fellman or Mr. Jack Lewis? [333] A. No.

Q. Now, in the period of your employment who has instructed you or told you what to do?

A. Joe.

Q. Has Mr. Jack Lewis ever given you any instructions?

A. Just once in a while; but not often.

Q. What kind of instructions did he give you on those occasions?

A. Sometime he came at the time I was cleaning shoes and sometimes he come and show us how to clean them. But that was all.

(Testimony of Charlotte Parker.)

Q. Did Mr. Fellman ever give you any instructions?
A. No. [334]

* * *

Redirect Examination

By Mr. Smith:

Q. Did you ever have any conversation with Mr. Jack Lewis about the union?
A. Yes.

Q. When did that occur?

A. I think it was about the second week after I was there.

Q. And where did it occur?

A. In the plant, at the cleaning table.

Q. Who else was present besides you and Mr. Lewis?
A. Lois Murray.

Q. What was said, and by whom?

A. Well, Jack asked me had anybody had me try to join the union. And so I said no. And he said just some girls in the plant trying to get something started, and always a few of those in every plant.

Q. Is that all the conversation?

A. Yes. I had signed a pledge card, but I told him no. [338]

* * *

LOIS HARTENTS MURRAY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Smith:

Q. Have you ever been employed by the Trina Shoe Company at Venice? A. Yes, I have.

Q. Can you tell us of the periods of your employment, when you went to work?

A. It is around April 15th, I think.

Q. How long did you work at that time?

A. I worked until about August 10th.

Trial Examiner Hemingway: This year?

The Witness: Yes.

Q. (By Mr. Smith): And when you first went to the plant who did you talk to about working there? A. I talked to Joe and Albert.

Q. And did you talk to them at the same time?

A. Yes, both of them were with me when I talked to them.

Q. Was anybody else there? [339]

A. It was another lady in there, but I don't know who she was. She was trying to get on, too.

Q. Trying to get on work? A. Yes.

Trial Examiner Hemingway: Was this in the office?

The Witness: Yes.

Q. (By Mr. Smith): What was said at that time, and by whom?

(Testimony of Lois Hartents Murray.)

A. Well, I asked Joe, I told him that I needed a job, and I asked him, was he hiring, and he told me yes, but he wouldn't need me right then, and said he would call me back in three days. And he didn't call me. And I went back myself, and Jack hired me then.

Q. Did Albert do any talking at this first time?

A. No, no, only asked me for my telephone number. That is all.

Q. You say you went back a second time. How many days later was that?

A. I think about three days later, and they hired me.

Q. You say that Jack put you on then?

A. Yes.

Q. Did you talk to anybody besides Jack this second time? A. No.

Q. You say your work ended on August 10th?

A. Yes.

Q. What happened then? Did you quit or get laid off—— [340] A. Laid off.

Q. Who laid you off? A. Joe did.

Trial Examiner Hemingway: Will you go back a couple of questions there? I got lost on the identity of the speakers.

(Record read.)

Trial Examiner Hemingway: Jack was the one who hired you, and Joe laid you off? Is that right?

The Witness: Yes.

(Testimony of Lois Hartents Murray.)

Trial Examiner Hemingway: That is Jack Lewis and Joe Levitan?

The Witness: Yes. [341]

* * *

Q. (By Mr. Smith): Now, in any of this period did you ever have any conversation with Mr. Jack Lewis about the union? A. Yes, I did.

Q. Was there one or more than one such conversation? A. There was more than one.

Q. When did the first one occur?

A. It was about the second week after I was there. He called me to the office.

Q. He called you into the office? A. Yes.

Q. And was anyone else present besides you and he? A. No.

Q. What was said, and by whom?

A. He called me, and he asked me how did I like the job I was doing, and then he asked me had I joined the union, and I told him no, I hadn't, and he told me not to because I would be out a lot of money paying the union dues. And that is all he said.

Q. You said there was at least one other conversation. [342] When did the next conversation occur?

A. I had been laid off before he called me back into the office again, and the same day he called me back to work, I was laid off, and he called me back, and he said did I join the union and I said yes. I said I didn't know what it was about when I joined.

(Testimony of Lois Hartents Murray.)

Trial Examiner Hemingway: You told him that?

The Witness: Yes, I did.

Q. (By Mr. Smith): Go ahead.

A. And he asked me who give me the slip to sign, and I told him I didn't remember because it was when I first came to work, and he told me it was only someone who was trying to be smart around; and that is all he said. [343]

* * *

EUGENE PIASEK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Smith:

Q. Have you ever been employed at the Trina Shoe Company at Venice?

A. Yes, I was—I am.

Q. You are now so employed?

A. That is right.

Q. About when were you first employed by the company?

A. I was first employed, I think, April 6th.

Q. What day of the week was that, if you recall?

A. It was on a Monday that I came in to work.

(Testimony of Eugene Piasek.)

Trial Examiner Hemingway: That is this year, isn't it?

The Witness: That is right.

Q. (By Mr. Smith): Did you work all of the time from that date up to the present time?

A. No, I was laid off for a couple of months. [349]

Q. About when did that layoff period come?

A. Sometimes in July or June, I don't remember exactly the time.

Q. You mean beginning in June or July, is that right, and running a couple of months?

A. That is right.

Q. All right. Now, will you tell us what happened in connection with your hiring. Were you interviewed at the plant? [350]

* * *

A. I came in, and Maury Fellman asked me who I am, and I told him, "I am sent from the Unemployment. I am a cutter." They called for a shoe cutter, so Mr. Maury told Jack Lewis to go ahead and talk to me. Mr. Jack Lewis started to talk to me and he asked where I worked, and I told him I had worked at Ted Saval's. So when I told him that I worked at Ted Saval's he asked me am I a union member. I told him I was and I had an argument with the business agent from the union and they kicked me out from the union.

So Mr. Jack Lewis said, "O. K., come in Sat-

(Testimony of Eugene Piasek.)

urday morning and we'll start you; we'll see how you cut." And I came in Saturday morning. [351]

* * *

Q. (By Mr. Smith): Did you have any conversation with anyone this day concerning your coming back to work the following Monday?

A. Yes. Maury Fellman took me to Jack Lewis in the office [352] and told Jack Lewis that I am cutting reasonable, so Jack Lewis said if I am a good cutter he wants me to come back in Monday.

* * *

Q. During the period that you were employed by Trina, did you ever attend any union meeting?

A. Yes, I did.

Q. Did you attend more than one union meeting?

A. Yes; I attended two union meetings.

Q. What was the date of the first union meeting you attended?

A. The date of the first union meeting was sometime about April 14th.

Q. Where was this meeting held?

A. This meeting was held in Santa Monica on Main Street; south or north of the company—I think it was north of the company—isn't it, this place? It was close to Venice Boulevard.

Q. All right. Will you go ahead and describe—well, I will ask you, first, if any incident occurred in your going [353] to the union meeting?

A. I went to the meeting, and I parked my car—when I parked my car, going to the front where

(Testimony of Eugene Piasek.)

it was, the pedestrian and walkway, about three cars in front of me, was parked Jack Lewis' Pontiac.

Q. Where did you park with respect to the side of the street where the union meeting was held? On that side or on the other side?

A. On the other side.

Q. And you say Mr. Lewis' car was parked ahead of yours?

A. That is right, about three cars in front of mine.

Q. Will you go ahead and explain what you did and what you saw?

A. So I walked on the crosswalk, the pedestrian crosswalk, and looking, I saw Mr. Jack Lewis' car and he was sitting in the car. When I walked through he bent over to the side, like I shouldn't see him—so (illustrating)—and I walked by.

Q. Did you go into the union meeting?

A. That is right, I did.

Q. By what entrance did you enter?

A. Through the front entrance.

Q. And on the following day did you have any conversation with anybody at the plant concerning the union, or the union meeting? [354]

A. Yes. When I came in in the morning, Jack Lewis was in the factory and he said to me—

Q. Just a moment. Was anyone present when this was said? A. Nobody else.

Q. Will you go ahead?

(Testimony of Eugene Piasek.)

A. He said to me, "I thought you told me you were not a union member."

I said, "I am not. I went to see what is going on over there." [355]

* * *

Q. When you were first employed by the company was any other cutter working at the company?

A. Yes. His name was Jack Rosenthal.

Q. How long did he and you both work for the company through this period?

A. We worked about three weeks together.

Q. And at the end of that time was it he or you who was not cutting?

A. Jack Rosenthal left.

Q. Did you have any conversation in the next few days with anyone at the plant concerning the reason for Rosenthal not being present?

A. Yes. The next day Albert Lewis told me to come in at 10:00 o'clock in the morning. I didn't know what the reason was for it. So I came in the next morning at 10:00 o'clock. Al Lewis told me the reason was that he told me to come at 10:00 o'clock in the morning was because, "I fired Jack Rosenthal last night."

Q. What was the date of that, if you recall?

A. I can't recall it.

Q. What was your usual hour of reporting in the morning?

A. My usual hour was between 8:00 and 8:30.

(Testimony of Eugene Piasek.)

Q. Did you have any conversation with anyone else in this [356] period about Mr. Rosenthal?

A. Yes, about a day later. Jack Lewis came over to the machine and I asked him why Rosenthal isn't working any more, and he told me that he made too much trouble here, and to him, for the union—this is the reason.

Trial Examiner Hemingway: Will you read that answer, please?

(Answer read.)

Trial Examiner Hemingway: From your answer I could understand that Rosenthal made too much trouble both for the employer and the union.

The Witness: He made too much trouble for the employer by the union. [357]

* * *

Q. All right. Now, this conversation you were about to describe, was anyone else present besides you and Mr. Fellman? A. Nobody else.

Q. Where did it occur?

A. The conversation occurred near my machine.

Q. Will you go ahead and tell what was said, and by whom?

A. Maury Fellman told me that he came up a week before, [358] he went into Jack Lewis and he told him it would be a lot better for the company, the shoes, get them cheaper, if they put everybody on piece work. Jack Lewis said to him, "O. K., we will make a try." They put everybody

(Testimony of Eugene Piasek.)

on piece work and the company gave out a lot more shoes than they usually used to give out, and the people used to make more money. So the end of the week Jack Lewis called in Maury Fellman and he——

Q. Now, you are describing what Mr. Fellman told you at this time? A. That is right.

Q. Go ahead.

A. Mr. Fellman said that Jack Lewis called him into the office and he told him the people were making too much money and he is spoiling them. [359]

Q. Did you ever have any disagreement with the company over how much was included in your check in a given week?

Mr. Perkins: What company are you talking about?

Q. (By Mr. Smith): With Trina?

A. Yes, sir, I did. It was quite a few times. I got my check and I knew I was supposed to have more money.

Q. What did you do on those occasions?

A. I went in and said to Jack Lewis, I said, "Jack, I think the check isn't right; should be more money than it is." So he went over the figures and he found the mistakes. It was one particular time that he found \$26.00 in a mistake on the check.

Q. And did he make the check?

A. That is right, he made the check.

Q. Now, did you have any conversation with Mr. Fellman about a claimed error in your check?

(Testimony of Eugene Piasek.)

A. That is right. It was Friday afternoon. He brought me over the check. It was about 4:00 o'clock.

Q. Is this the conversation you were about to relate a couple of minutes ago?

A. That is right. [362]

Q. Can you place when this occurred, the month?

A. Sometime in May, the end of May.

Q. Will you go ahead?

A. And I was missing money in the check. I went over—I was looking for Mr. Jack Lewis. Jack Lewis wasn't there. I went over to Mr. Fellman and I told Mr. Fellman, "I am missing money from the check."

So Mr. Fellman said, "You know, Gene, I can do nothing about it. You'll have to wait for Jack." So I waited until next week——

* * *

Q. (By Mr. Smith): What did you do on the following week about this alleged error?

A. In the following week I brought back my paycheck and I showed it to Jack Lewis and he brought the timecard where [363] he used to count together, and we found an error of some money in the check.

Q. And did he correct the error?

A. Yes, sir. [364]

* * *

Q. Did you have any conversation with Mr. Albert Lewis [367] wherein the subject of the reason

(Testimony of Eugene Piasek.)

for the Trina operation being in Venice came up? [368]

* * *

A. Yes, there was.

Q. When did it occur?

A. It occurred sometime in May of this year.

Q. Where did it occur?

A. It occurred when I was working on the machine.

Q. And was anyone present, other than yourself and Mr. Albert Lewis?

A. Just myself and Mr. Albert Lewis.

Q. Will you please tell us what was said, and by whom?

A. We were talking, and I said to Albert Lewis, "Wouldn't it be better for you to belong to the union than to run away from them? It costs you more money——"

Trial Examiner Hemingway: When you say "you," are you referring to him personally?

The Witness: "To your father," I mean. And he said no. He said, "The first year we belonged to the union we lost \$10,000.00."

Then I asked him what they would do if the union would catch up with them over here. He said that they will move out to another city. [371]

* * *

Q. (By Mr. Smith): Now, my next question has reference to the entire time that you worked for Trina, which I understand is most of the time until

(Testimony of Eugene Piasek.)

early April—from early April until now, except for a two months layoff period—does that describe, in a general way, the period that you worked for [375] Trina? A. That is correct.

Q. Now, in that period of time did you make any observation concerning the time that Mr. Jack Lewis was in the building in which the Trina factory is located? A. Yes, I did.

Q. What was that observation?

A. When Jack Lewis used to be in the plant, most of the time, he used to spend in the factory, inside, checking the work, and so forth.

Q. Where else did he spend time?

A. In the office.

Q. And keeping in mind the ordinary work week of 40 hours, or whatever it was, how much of that time did he spend in the building?

A. He spent in the building about 85 per cent, between 80 and 85 per cent.

Q. And the other 15 or 20 per cent he spent then outside of the building?

A. Out of the building.

Q. I will ask you, was that on a particular day, or on several days of the ordinary work week?

A. Was on one day of the week.

Q. And on that day what was his practice?

A. Selling outside. [376]

Q. Did he spend any time in the office on that particular day?

A. A couple of hours in the morning.

Q. And then he would be gone the rest of the

(Testimony of Eugene Piasek.)

day? A. That is correct.

Q. Now, what chance did you have to observe his being in the plant? Was your operation in a position where you could see the office and the rest of the factory?

A. I used to go in and pick up the tickets for my cutting.

Q. How many times a day did you do that?

A. Sometimes four, five times a day, and I used to go into the office and call Albert Lewis in the factory—he have to lay out the material for me, because every time I had to need the material I had to go in to look for Albert Lewis.

Q. What was Albert's job in the plant, as far as you could see, with respect to your job? How did your two jobs interrelate, if at all?

A. He used to lay out the material for me.

Q. Did that take a larger part or a lesser part of his time at the plant?

A. Used to take the lesser part of his time.

Q. Where did Mr. Joe Levitan spend his time? What portion of his time was spent in the building at which Trina is housed? A. 100 per cent.

* * *

Q. Are you able to tell us any reason why any or all of these individuals would come around to you and confide their business plans to you?

* * *

The Witness: Yes, I will. Mr. Maurice Fellman wasn't very good off in the plant there.

(Testimony of Eugene Piasek.)

Trial Examiner Hemingway: Wasn't very good off?

The Witness: When Albert Lewis got a raise from the company from \$75.00 to \$90.00, Maury Fellman came over to me and he complained about it, that he is supposed to be the president of Trina Shoe Company and he is getting \$80.00, which he has to support a wife and two children; and [401] Albert Lewis, because he got married, he got a raise to \$90.00. [402]

* * *

Q. How did you go from the plant to the union meeting? Did you walk or ride in a car or what?

A. I rode in the car.

Q. Your own? A. That is right.

Q. Anybody else with you? A. No.

Q. And was Mr. Lewis in the car by the curb when you got there?

A. He wasn't by the curve, he was parked.

Q. Parked at the curb?

A. Wasn't at the curve; was not a curve over there. [419]

Q. Anyway, the car was on the side of the street? A. That is right.

Q. Was it already there when you got there?

A. Yes.

Q. You didn't see him pull in and park?

A. No.

Q. You don't know when he left the plant that day? A. No, I didn't.

(Testimony of Eugene Piasek.)

Q. When was this union meeting called, to your knowledge?

A. It was on the 14th of April, if I am not mistaken. [420]

* * *

Q. Were you told by anybody connected with Trina Shoe Company that there was any practice of not punching in or out on Saturdays?

A. Yes, I was.

Q. By whom? [433] A. By Joe Levitan.

Q. By anyone else? A. No.

Q. Did he say that that was the way it was done, that employees who worked on Saturdays didn't punch in?

A. He told me Friday night that, when this was the first Saturday he wanted me to work, "You come in tomorrow morning on Saturday, but you won't punch the card." [434]

* * *

Q. (By Trial Examiner Hemingway): I want to get it straight on this testimony concerning your seeing Mr. Jack Lewis before the union meeting.

With reference to the place where the building was that you were going to enter, where was his car, on the far side or the near side of the street?

The Witness: Across the street.

Q. Was it on the street or in a parking lot?

The Witness: On the street.

Q. And was his car parked in the direction in which traffic generally flowed on that side of the street?

(Testimony of Eugene Piasek.)

The Witness: The car was parked in the direction facing the factory.

Q. The factory?

The Witness: That's right. [435]

* * *

Q. Did you observe him again after that one glimpse, at any one time before you reached the Union Hall?

The Witness: Yes; I have seen him, and then when I came across to the Union Hall we were staying outside and I mentioned to a few people there that Mr. Jack Lewis was parked across the street. [438]

* * *

Q. (By Mr. Perkins): You told some people on the sidewalk that Mr. Lewis was sitting across the street?

A. Yes.

Q. And did you tell them where he was?

A. Yes.

Q. And did they turn around and look at him?

A. Yes, a few people looked. [439]

* * *

JACK ROSENTHAL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Smith:

Q. Mr. Rosenthal, were you ever employed by

(Testimony of Jack Rosenthal.)

the California Footwear Company at the Los Angeles address? A. Yes, I was.

Q. About when?

A. About four years ago.

Q. And were you ever employed by the Trina Company? Were you ever employed by the Trina Shoe Company at its Venice location?

A. I was.

* * *

Q. (By Mr. Smith): In 1952 did you have any conversation with Mr. Jack Lewis concerning working again at California? [443] A. I did.

Q. What was the date of the first such conversation, and what gave rise to it?

A. The approximate date was about the middle of December. I don't know the exact date. What gave rise to it was the telephone call I had received from him approximately two or three weeks earlier. He asked me to come back to work for him. At the time I told him I was doing something else and I was satisfied with it. Later, what I was doing didn't turn out right and I called him back and asked him if the job was still open. He said it was and to come down and see him.

Q. Did you go down to see him at that time?

A. I did.

Q. And this was about mid-December?

A. About then.

Q. And did you talk to him at the Los Angeles plant? A. I did. [444]

* * *

(Testimony of Jack Rosenthal.)

Q. All right.

Will you go ahead and tell us what was said and by whom, in that conversation?

A. Well, Jack Lewis told me that he did not have an opening there at that time, but that there was an opening in another plant close to where I live. Incidentally, I lived at 3630 Kalsman Drive at that time, and it was only about seven or eight miles from the Trina Shoe Company. He said there are five clickers there and you will be the first employee. I asked him whether he had any financial interest in it, in the way of trying to find out who I was working for and he said, "I own all of it." [445]

* * *

Q. Did you go to work at Trina after this date?

A. Not immediately after. I went to work about the 5th or 6th of January. I don't remember the exact date.

* * *

Q. (By Mr. Smith): How long ago did you work continually at Trina?

A. I believe the last day I worked was April 27. I'm not exactly sure of that, it was approximate.

Q. Did you work substantially all the time, between, that is, between January and that date?

A. I worked straight through. [446]

* * *

Q. Did you have any other conversations with Mr. Fellman concerning the union?

A. Yes, prior to the meeting. I was about to go home——

(Testimony of Jack Rosenthal.)

Q. Let's place the time of this. Was it the same day or a later day?

A. A day or two before, I don't remember exactly. I was on my way home. I was the last one to leave the place. Mr. Fellman and I were the only ones in the factory. Before I went out, he engaged me in conversation pertaining to the union and said to me, "If I were you, I wouldn't go to that meeting."

I said, "Why not?"

And he said, "You might be breaking bread with Jack Lewis some day." [453]

* * *

Q. Have you ever been sent for in any period following?

A. Yes, approximately a month later a telegram came and asked me to come back to work. I did come back, I went out to see them rather, and told them that I was working on something. [455]

* * *

The Witness: It was a telegram.

Q. (By Mr. Smith): When you went back, did you go to the plant as a result of that telegram?

A. Yes.

Q. And who did you talk to?

A. I spoke to Jack Lewis and Maurie Fellman.

Q. What was said and by whom?

A. I said that I was tied up right now and I would know in two or three days whether I would come back to work, and if they could use me at that time, if this deal that I was working on did not

(Testimony of Jack Rosenthal.)

materialize, I would go back to work. Well, it didn't materialize.

Q. Did either Mr. Fellman or Mr. Lewis make any comment about that?

A. No, they did not, but they led me to believe that I would be welcome back if I wanted to come back.

Mr. Perkins: Move to strike "led to believe."

Trial Examiner Hemingway: Sustained—granted, I mean. [456]

The Witness: Three days later I did come back and said that my deal fell through and I wanted to go back to work. Mr. Fellman told me at that time that there was no work, that they needed me three or four days ago but not now. [457]

* * *

LINDA MURRAY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Smith:

Q. During the course of your employment, was there ever a meeting of the employees held on company premises when the union was discussed?

A. Well, the day that Mr. Tutt brought the names out there and showed them to Mr. Fellman, we had a meeting that evening.

(Testimony of Linda Murray.)

Q. Now, can you place the date of that meeting, if you know?

A. Well, it was along either the 23rd or 24th of March. It was the day he wrote the names out.

Q. Now, we will come to that meeting in just a moment. Did you have any conversation with Mr. Fellman about the union at any time earlier that day?

A. No, I hadn't.

Q. Did you have any conversation with Mr. Fellman about the union at any time around about the 24th of March?

A. After that meeting, I talked to him some.

Q. Who was present at the time you talked to him? Do you mean later the same day?

A. The same day. Aldea Callahan was across on another machine, right across from me. [478]

Q. That is Aldea Callahan's card that you have identified?

A. Yes, sir.

Q. Was anyone else present?

A. That is all, just the two.

Q. What was said and by whom?

A. I called him to work on my machine. My machine broke down and I called him to work on the machine and he said he was mad at me. I said why, and he said he didn't trust anybody any more, and he asked why I signed that union card. I said, "I signed the union card." He said, "Yes, you did. I know all of them that signed it." And he told Aldea, "You did, too." And she said, "Well, how do you know?" And he said, "Well, the Union man had been out and he said so."

(Testimony of Linda Murray.)

He set there a little while and—Fellman set there a while—and then he said to me. “I know where that rumor come from, now.”

There had been a rumor going around in the shop that Mr. Lewis was going to fire anyone that joined the union.

And I said, “I don’t believe it.”

And Mr. Fellman said to me, “I know where the rumor come from,” and I said, “Where?”

He said that Jack Rosenthal had told it and I told him, “No, he hadn’t said that. It hadn’t come from him. It come from the other room,” but I don’t know who it was from.

And he said, he asked me if I knew that they could shut [479] the shop down, and I said, “Well, that way it wouldn’t make no money for nobody.” [480]

* * *

Cross-Examination

By Mr. Perkins:

Q. Mrs. Murray, you referred to Mrs. Cherry. What kind of work did she do at the plant in Venice?

A. She cuts spaghetti, what you make to go on shoes and ties around the ankle.

Q. Were there any employees besides Mrs. Cherry doing that work at the time she was doing it?

A. They had a colored girl. I don’t remember her name, in fact, I never knew her name. They

(Testimony of Linda Murray.)

had a couple different colored girls on it, and then they had this Gerline Kelly on it and she got sick and then is when Anna Cherry was hired in.

Q. Well, while Mrs. Cherry was working there, though, on that work, was there other employees doing the same kind of work?

A. No, not then. [485]

* * *

Mr. Smith: I propose the following stipulation: That at all times, from about late January until the current time, and except for two months, that the plant was largely shut down, that at the Trina plant there was a sock-stitching operation performed on a stitching machine that was the same type of operation and the same type of machine used which Blanche Roarke had performed during the last two years of employment at California Footwear; and, further, that this work at Trina, the sock-stitching at Trina, was at all times performed by a member of Local 122 of the United Shoe Workers of America, CIO.

Mr. Perkins: That is satisfactory. [504]

* * *

Mr. Smith: We have one or two stipulations to propose. Do you want to go further with them, first?

Mr. Perkins: Yes.

This is information with respect to Trina Shoe Company. It is a California Corporation, incorporated August 6th, 1948. It has authorized capital of 500 shares of stock of \$100.00 par value each. Not all of that stock has been issued. I am unable to

give the particulars now, but I hope to be able to before the hearing is over.

The directors of Trina Shoe Company at the present time are Maurice Fellman and Ruth Fellman, who is his wife, and Evelyn Fellman, who is Mr. Fellman's sister.

The officers are Maurice Fellman, president, Ruth Fellman, secretary-treasurer.

All of the stock at the present time is held by Maurice Fellman and/or Ruth Fellman.

The only other persons who have ever been officers or stockholders of Trina Shoe Company are Louis Wolfe, W-o-l-f-e, and Izador Rosen, R-o-s-e-n. They are not connected with Trina Shoe Company at the present time. Neither Mr. Wolfe nor Mr. Rosen is related to Jack Lewis or Joseph Levitan, and neither of these gentlemen, that is Wolfe and Rosen, have ever had any interest in or dealings with California Footwear Company. [508]

Trial Examiner Hemingway: May I ask one question? You say that they were once connected with the organization. Did they cease to be connected before the latter part of 1952?

Mr. Perkins: Yes, it is my understanding that their connection with Trina ceased at least two years ago. I believe that Wolfe and Rosen at different times, in addition to having a stock interest and being directors, performed selling for Trina Shoe Company.

Further, I offer to stipulate that neither Jack Lewis nor Albert Lewis nor Joseph Levitan nor California Footwear Company has ever owned any

stock in Trina Shoe Company. Nor have any of the individuals named ever been an officer or director of Trina Shoe Company.

Further, when Trina Shoe Company was organized, Maurice Fellman transferred to it the equipment and other assets of a shoe manufacturing business which immediately prior to that time he had been conducting as an individual proprietorship.

I believe that covers what we talked about.

Mr. Smith: So stipulate. [509]

* * *

Mr. Smith: I think the case on Banche Roarke is extremely strong. I don't believe my stipulation mentioned the name of Mr. Oster. If it didn't, we now concede he was the one who did this work at the new plant after—and, of course, we have shown that he was a union member. [527]

* * *

Mr. Perkins: Now, we move to dismiss as to Jack Rosenthal. It appears there that the employer had to make a selection from among two union members and the same situation exists there. Moreover, it appears that he was recalled and didn't take the job when it was offered to him, although he admitted there was time enough for him to get ready to go back to work if he had wanted to.

I may say in that connection, maybe the Board isn't advised yet or the union, but Mr. Rosenthal returned to work this morning. There is work for one cutter, either Rosenthal or Piasek, on the present basis. Evidently the basis of this prosecution is

that Rosenthal was let go instead of Piasek. All right, we are adopting what seems to be the suggestion of the Board. Trina called Mr. Rosenthal and put him to work this morning. I suppose the Labor Board, as logically as everything done so far here, that is, the prosecution can say whatever the employer does here is wrong. We adopted the Board's, we understand the sense of the Board's suggestion, and have taken Mr. Rosenthal back this morning, without prejudice.

Trial Examiner Hemingway: My recollection was that there was evidence that someone else besides Mr. Piasek was working as a cutter, which would seem to indicate that there was room for two, and I didn't believe there was any suggestion at the [537] time that when Mr. Rosenthal was sent for that Mr. Piasek was going to be laid off, in lieu of Mr. Rosenthal.

Mr. Perkins: To break that down, I think the testimony is that at the time Rosenthal was laid off there were only two cutters there. Maybe somebody was doing the cutting work later on——

Trial Examiner Hemingway: I have considered that, Mr. Perkins, once an offer is made to reinstate, as it was in this case, that may be argued to be a complete exculpation and that even though there might have been a job for such a person, the respondent might, perhaps justifiably, refuse to offer to Rosenthal, who previously refused to accept or had not accepted, at least. I don't recall that there was any evidence of agreement to let the matter ride in abeyance; in other words, to extend the offer of

employment beyond the day when Rosenthal was hired. I may be wrong on that. What about that, Mr. Smith? Was there such evidence?

Mr. Smith: I think you have repeated the testimony exactly as was given.

Trial Examiner Hemingway: That is a matter, however, that I am not prepared to answer at the present time. I am not sure just what the cases may show on that.

Do you know whether there are any cases on that, Mr. Smith?

Mr. Smith: Well, no, I would consider that a factual problem and I think it might be exceedingly difficult, at least [538] for the future from now on, as to which of these two employees is entitled to the job, but I don't think that is material, at least to the question of discrimination, up to the time Mr. Rosenthal was given this offer which he testified to, which, if my recollection serves me right, was about a month after his discharge, and, incidentally, after the charge was filed. As a matter of fact, we have the situation on both Mrs. Roark and Mr. Rosenthal being offered their jobs back after they have filed the charge in the case.

Now, I take it, counsel's basic problem here is whether there was a discrimination extended through that first month. That is the primary problem to this point. What happened after that point is completely irrelevant.

Trial Examiner Hemingway: Let me ask this question: If I recall the evidence, there was discussion between the respondent and Rosenthal as to

whether or not he was familiar with leather cutting and also with Piasek and I think it was determined by the respondent that Piasek had more experience than Rosenthal in that, and inferentially let Rosenthal go because of the fact there wasn't going to be any plastic cutting for him.

Now, I am just wondering whether you contend there either was continued manufacture of plastic shoes, or if you are contending there was enough leather work for two cutters or just what your contention is, as to that? [539]

Mr. Smith: In the record, Mr. Trial Examiner, is testimony that about 85 per cent of cutting through the entire period herein, the material was plastic and about 15 per cent was leather cutting. Further, we contend that Mr. Rosenthal was capable of leather cutting and was not even given a chance to demonstrate a capability and that this was clearly proved in this record to be a pretext, rather than the actual reason for his layoff. I further point out that there is testimony in this record that indicates that there was, through all periods, material herein, more than enough work for one cutter; perhaps work for two, or, at least, one and one-half. And that this employer, to effectuate the discrimination, was willing to play fast and loose, both with the contract and with the wage and hour law by paying Mr. Piasek—by failing to pay him overtime for hours worked in excess of eight a day and in excess of 40 a week, while he worked through this period. I think it would add up to about 55 to 60 hours per

week, so I don't think the record is clear at all that there was work for only one cutter. It suggests, rather, a cutter and a half, or two cutters. As a matter of fact, both of them were employed for a period something like 30 days, indicating that there must have been work for the two of them during that period of time.

Mr. Perkins: Again, I think the general counsel is again trying to tell people how they should run their factory. Now, the fact that they were, I think anybody familiar at all with [540] manufacturing, particularly in lines of that having anything to do with styles, knows it goes up and down and the fact that you have two people employed at one time doesn't mean work for two, later on. All it means is there was work for two men when the two were working together. The testimony that Mr. Piasek worked overtime, in part, couldn't indicate work for two men. It indicates that there was work for more than one man working straight time 40 hours. Now whether or not to work a man overtime a few hours or whether to hire another man and give both of them bob-tail weeks or give one of them a full week and hire the other one for a day or two a week, is certainly a matter of management decision, and maybe Mr. Smith thinks that if he had the factory he would do it one way, but, certainly, for the employer that knows the business to do it another way, although it differs with the managerial discretion exercised in the general counsel's discretion, doesn't constitute an unfair labor practice. It indicates whatever the employer does the employer is going

to be wrong. If he lets Piasek go, or if he lets Rosenthal go, he will be charged with an unfair labor practice. Whatever way it turns up, general counsel will be able to rear back and go into talk about a general 8 (1) violation. Everything after that the employer does is bound to be wrong. All we can do is fight it, and that is what we are doing.

Trial Examiner Hemingway: I think the principal issue is [541] whether or not there was work enough for two men. On the general counsel's case he points to the stipulation that throughout the whole period 85 per cent of work was on plastic. Now, so far, I haven't heard any evidence from the respondent that during the period when Mr. Rosenthal was released there was any reduction in the call for plastic shoes, and, also, in view of the evidence that someone else besides Piasek was doing some cutting during this period, that taken together with the amount of work that Piasek was doing overtime might perhaps have made up enough work for two men. It seems to me that such matter would require explanation.

I am not making an ultimate decision at the present time, but I think the evidence that has been pointed out does support the general counsel's theory to be *prima facie*.

Mr. Perkins: I suggest that amounts practically to shifting the burden to the respondents, because on the basis of the showing made by the general counsel, which is so flimsy and which involves, really, a decision by the government as to how these people ought to run this plant, then it becomes

the duty of the respondents to justify their management decisions to the satisfaction of the government. We will try, under the situation that we are placed in by your Honor's ruling, and I will say that the effect of it is to shift the burden.

Trial Examiner Hemingway: I wouldn't call it shifting it, the burden of going forward with the evidence after a [542] *prima facie* case has been made out, and in denying your motion to dismiss Rosenthal, Cherry and Roark, I will not, of course, deprive you of the opportunity to make similar motions at the close of the hearing. [543]

* * *

EUGENE PIASEK

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Perkins:

Q. Have you been to the plant, today, of Trina Shoe Company? A. Yes, sir.

Q. You saw Jack Rosenthal there?

A. Yes, sir.

Q. You saw him working, did you not?

A. Pardon me?

Q. You saw him working? A. Yes, sir.

Q. And did you say to somebody there that you were coming down here to the hearing and would give the employers some more trouble? [569]

A. No, sir.

(Testimony of Eugene Piasek.)

Q. You didn't say that, or anything like that, to anybody out there? A. No, sir.

Q. Did you say you saw Mr. Levitan there today? A. Yes, sir.

Q. Did you have any discussion with him?

A. May I say what I said to him?

Q. Did you have a discussion with him?

A. Yes, sir.

Q. And you said to him, did you not, that you thought you ought to have the job instead of Mr. Rosenthal? A. No, sir.

Q. Did you say anything to him about the cutting job? A. Yes, sir.

Q. You said you thought you ought to have it, didn't you?

A. No, may I say what I said to him?

Q. I don't care what you said to him. I will ask you the questions. If somebody else wants to ask you, they will ask you.

Mr. Smith: I will move all the testimony be stricken as wholly immaterial to any issue in this case.

Trial Examiner Hemingway: There is some of it that is relevant.

Q. (By Mr. Perkins): Right after being at the plant this [570] morning, you came down to the Labor Board hearing, did you not?

A. Yes, sir.

Q. You talked to Mr. Smith, didn't you?

A. Yes.

Q. You complained to him that Mr. Rosenthal was working instead of you, didn't you?

(Testimony of Eugene Piasek.)

A. I didn't say anything about it.

Q. Didn't you tell Mr. Smith that Jack Rosenthal was working instead of you?

A. Yes, but I didn't complain.

Q. You told him that? A. That's right.

Q. You asked him to do something about it?

A. I didn't, not yet.

Q. Didn't you ask him to do something about it? A. Not yet.

Q. You intend to ask him to do something about it? A. I don't know.

Q. Did he say whether or not he was going to do anything about it?

A. He didn't say anything. I didn't ask him anything.

Q. What did he say when you told him Jack Rosenthal was working instead of you?

Mr. Smith: I object. That is now wholly beyond anything in this case. [571]

Trial Examiner Hemíngway: Sustained.

Mr. Perkins: Well, I would like to make sure of that. If it is outside the case. Can the government tell me if it has any intention of proceeding against the respondents, because now Jack Rosenthal is working instead of Mr. Piasek?

Mr. Smith: If counsel wants me to speak on a charge that may be filed at a time in the future, I refuse to answer.

Mr. Perkins: I think we ought to smoke it out. It develops to a point of absurdity that isn't the respondents' own making. It again points up the

(Testimony of Eugene Piasek.)

government's position that whatever the respondents do is wrong. I think we are entitled to a fair and candid answer as to what the government is trying to do.

Trial Examiner Hemingway: Whether or not the respondent is guilty of the unfair labor practice in the case of Mr. Rosenthal is dependent upon whether or not there was work for two men. Insofar as the question of seniority may have been in issue, that might also be of some consideration. Now, if there is not work for two men at the present time, then, of course, as far as the seniority situation is concerned, that has been cured. But I don't think that it is fair to ask Mr. Smith to decide the question as to whether or not there is work enough for two men on the facts that are known—unknown, at this time.

Mr. Perkins: Well, I do think the respondents are [572] entitled to notice of the government's intention. I assumed from the case the government put on that it was the intention of the government to establish that Mr. Rosenthal should have been preferred to Mr. Piasek. If the government meant to contend that the employer should have hired two, when, in the employer's judgment, one would do the job, that might be another thing. But I think that is a matter of managerial discretion which the government doesn't ordinarily concern itself with, and I think we are entitled to a fair disclosure of the government's intentions here. What they may

(Testimony of Eugene Piasek.)

be doing is lying back and seeing how they fare in Mr. Rosenthal's case, and then if the Examiner holds, the Board holds, against them—against the government on that one—then they got another one in reserve to file, one for Mr. Piasek.

Now, I think we are entitled to a fair contention on the part of the government. We are trying to comply to some extent with what they want. What we are trying to find out is what they want.

Trial Examiner Hemingway: I will permit you to ask Mr. Smith what his intention is in this case. I won't require him to state what his position is in the possible future case.

Mr. Perkins: I would like to ask him to state when there is work for one, whom the government contends ought to do it?

Trial Examiner Hemingway: Let me amend that, if you will. Let me ask Mr. Smith whether, if there was enough work for only [573] one man, he would contend that the lay-off of Rosenthal was an unfair labor practice because of the fact that he had seniority over Mr. Piasek?

Mr. Smith: I certainly do. I wanted to correct the Trial Examiner's statement of a moment ago in that regard, insofar as it indicated it was a statement of the general counsel's position.

We think the Rosenthal case is a clear discrimination, wholly, regardless of the question of how many cutters were required, because of the circumstances of his discharge without pointing up all the separate items in evidence in that. I think the

(Testimony of Eugene Piasek.)

case is remarkable in completeness and persuasion. It is true that one month, roughly, after Rosenthal's discharge he was offered employment, but that was after the charge had been filed that he was offered his job back and that by his own testimony he indicated that he turned it down and three or four days later, I believe, he said he went back and tried to get in and at that time he was told there was no job there.

With respect to developments after that time, and especially with respect to anything developed today, I don't see how I can speak, because investigation has not been conducted. I certainly think the case is very strong at a minimum.

Trial Examiner Hemingway: I won't require you to speak on that. In other words, I don't expect you to make a statement [574] with regard to your position on a charge that isn't even filed.

Mr. Smith: Now, the Trial Examiner did indicate that perhaps it would be appropriate that I speak on my position of who should have the job if there is only one job. That problem itself is one that relates directly——

Trial Examiner Hemingway: That wasn't my question. That was Mr. Perkins question.

Mr. Smith: I don't say that this can be answered. I don't know. Counsel is the one suggesting the charge be filed. I have made no suggestion, nor has he been able to elicit anything from this witness that pertains to this question.

Mr. Perkins: I think we are entitled to know the

(Testimony of Eugene Piasek.)

government's position on who should have the job. I think when the government starts to prosecute these cases it's got some idea of accomplishing some results other than just needling the employer. We are trying, within certain limits, and as dictated by prudence, to do what the government wants. We are having difficulty in finding out what the government wants. I think we are entitled to be advised of that.

Trial Examiner Hemingway: Mr. Perkins, you are an attorney, it is your job to give advice and it is not the requirements of either counsel for the National Labor Relations Board of the Trial Examiner, or anyone else here, to advise you as to what is and what is not an unfair labor [575] practice.

Mr. Perkins: I might say with all respect it isn't a question of what is an unfair labor practice. I can give advice on that, but I can't advise myself as to what the contentions of the government are.

Trial Examiner Hemingway: You are asking counsel to make a contention on something that is not in issue in this case, and that is whether or not the suspension or lay-off of Mr. Piasek here is going to be regarded as an unfair labor practice.

Mr. Perkins: I might suggest that that isn't it precisely. I am trying to say, does the government contend that Mr. Rosenthal should have the job. Mr. Rosenthal is mentioned in the complaint as having been discriminated against and such dis-

(Testimony of Eugene Piasek.)

crimination is continuing on, according to the complaint, down to the present time.

Trial Examiner Hemingway: Again, Mr. Perkins, you're asking Mr. Smith to decide something on assumption of fact, and that is this, there is work enough only for one man. It may be that if that is established, Mr. Smith might say, "Well, yes; on that basis, maybe Mr. Rosenthal is the one who should have the job," but I wouldn't expect him to concede that point or draw that assumption at the present time.

Mr. Perkins: It seems to me that is the very minimum that he should disclose here. We are trying to minimize the liability and find out what the specific contentions are, and [576] decisions have to be made day by day in the employer's business.

I would assume from the whole tenure of the government's case that they were complaining because the employer chose to lay off Mr. Rosenthal, rather than Mr. Piasek. All right; now, then, we put Mr. Rosenthal back and let Mr. Piasek go, and now the government wants to study and see whether or not they can't try the other, work the other side of the street and still convict us of an unfair labor practice.

Mr. Smith: To show you how this is shaping up, my first word that Mr. Piasek has been discharged, or laid off, or whatever the company here wants to term it, came about 30 minutes ago, and counsel is trying on the record to get immediate commitment of what implications that recent development

(Testimony of Eugene Piasek.)

has in the case. Were the shoe on the other foot, were I to go in and try to amend this 8(a)(3) charge, I think the counsel might very well take the contrary position and complain of surprise.

Trial Examiner Hemingway: I don't think it is necessary to discuss this any longer. [577]

* * *

JACK LEWIS

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows: [578]

Direct Examination

* * *

By Mr. Perkins:

Q. Calling your attention to the year 1952, did you secure information concerning the state of your health in the year 1952?

A. Yes; quite a great deal of it.

Q. What information did you get?

A. After quite a lot of check-ups and examinations with several doctors, including X-rays, blood tests and everything that goes with it, and having even been examined by Dr. Griffith in Pasadena, which happens to be the head professor of medicine from U.S.C., I was told I have an incurable disease called lymphoma of the spine, in short, deterioration of the bone structure of the spine, all the way through the body. They have found deterioration of the bone in the lower part of the spine and also in

(Testimony of Jack Lewis.)

the skull. I have three definite holes in the skull now.

Q. Have you recovered from that condition?

A. No; I have not recovered. I am on special diets and [580] care and special medicines and I took the full amount, full share of X-ray treatments that a person, a human being can take. They just tried to check it so that it will not travel any further, but that is about the extent that it is now.

Q. Now, did you receive any advice from any physician in 1952, as to whether or not you could or should continue your work at the same amount and degree as you had in the past?

A. Oh, yes; definitely. I was told to take it easy as much as I could possibly do. In fact, the doctor advised me, he said, "If you have enough insurance policies whereby it covers certain disability clauses, it would be perfectly in line to give you a letter to that effect, so that you can apply for this disability, you won't be in any condition to work at all in a very short period." In fact, he said it would be, the most he could think would be about two years.

I was advised if I can do that, to take it as easy as I possibly can and not to have too much aggravation and plenty of sleep and rest and take it generally as light as you possibly can.

Q. I think when the government called you as a witness, they asked you something about the lease on the premises on Los Angeles Street, occu-

(Testimony of Jack Lewis.)

pied by California Footwear. Did that lease expire some time in 1952?

A. No; that lease expired in February, 1953.

Q. I see. I think that answers that question. Now, the [581] next one is, before that lease expired, did you have information as to whether or not the landlord would be willing to renew at the same rate, or whether he wanted more money for a renewal?

A. I was advised that the landlord definitely wanted to have more money under renewal.

Q. Now, at some point you went out and arranged for space in Venice; did you not?

A. That's right.

Q. Now, will you tell us what it was that led to a decision to seek space in Venice?

A. Well, there were several all put together. Primarily, it was my health that I am concerned with and the doctor told me to take it easy, and being that I live out in Santa Monica and I have to travel every day back and forth to downtown Los Angeles, it was quite a great effort and, on top of it, the increase in rent that the landlord wanted for renewal of the lease made me decide that I should look for other quarters closer to home, space closer to my home, whereas I wouldn't have to travel every day downtown and come to the place later and go home earlier and generally take it a little easier.

Q. Did you have a discussion with Mr. Fellman

(Testimony of Jack Lewis.)

at any time about his manufacturing shoes to sell to California Footwear? A. Yes; I did.

Q. And who brought up the subject of his doing that, did he [582] or did you?

A. Well, Mr. Fellman brought up the subject originally because in the state of mind that I was in at that time I was definitely, I definitely made up my mind in order for me to accomplish all these things and by the advice of my doctors, I decided to discontinue manufacturing altogether and move out close to my home.

Q. And you told him that?

A. Yes; I told Mr. Fellman and he suggested to me that if that may be the case and being that I knew him for a long time and know his capabilities and all, he suggested that he should make the shoes for me, providing, of course, that I am able to furnish him in a way that he should be able to operate.

Mr. Smith: Fix the date of the conversation.

Mr. Perkins: Yes.

Q. (By Mr. Perkins): Can you fix the date with reference to the time, for example, when you went to look for space, before or after or around that time, or when?

A. I would say about the same time, generally about the same time.

Trial Examiner Hemingway: I don't know when he started to.

Q. (By Mr. Perkins): When did you lease the space in Venice?

(Testimony of Jack Lewis.)

A. It was the latter part of November, 1952.

Q. And, I think that there may have been some testimony [583] earlier relating to December. Have you since checked to see when it was that you did lease the space in Venice?

A. Yes; I did check.

Q. Did you find it was—when it was?

A. It was late in November.

Q. In these discussions with Mr. Fellman, was there anything said about the situation of Trina Shoe Company, so far as its credit was concerned?

A. Oh, yes; we had discussed that.

Q. What was discussed?

A. Mr. Fellman gave me to understand that the present situation is in very bad shape. In fact, they had a chattel mortgage with the Bank of America on his equipment and several other creditors were pressing him for money, and in order to do any manufacturing for me, I would have to advance him some money for, to clear off his credit, some of his creditors, and also, to take over the chattel mortgage on his equipment from the Bank of America.

Q. Did you advance money so that he could pay off the Bank of America? A. Yes; I did.

Q. And did you take a chattel mortgage yourself, that is, for California Footwear, on the same machinery? A. That's right. [584]

* * *

Q. Mr. Tutt testified, I believe, that at some

(Testimony of Jack Lewis.)

time or other, which he places in January, '53, he mentioned to you something about, "What about employees of California getting jobs in Venice?" and that you referred him to Mr. Fellman.

I will ask you whether or not you ever had such a conversation with Mr. Tutt? A. Yes; I did.

Q. And did you refer Mr. Tutt to Mr. Fellman, to place employees in Venice?

A. I did. [585]

* * *

Q. Mr. Tutt testified, I believe, that he asked you what would become—withdraw that.

He asked you "What about a contract for Venice?" and that you said he would have to see Mr. Fellman. Did that conversation take place?

A. That's right. [586]

* * *

Q. Did you ever hire any employee to work in the production at Trina plant in Venice?

A. Not directly; no.

Q. Did you ever interview anyone for hire?

A. Yes; I interview quite a few.

Q. And to whom—would you send them to somebody?

A. Yes; I would send them after I was interviewing, I would send them over to Mr. Fellman to get all the information or instructions or whatever he has to offer.

Q. Who made the decision as to whether or not the person would be hired?

A. Mr. Fellman did.

(Testimony of Jack Lewis.)

Q. Now, did you ever have any conversation with Mr. Fellman about your interviewing for him on occasion? A. Yes; I did.

Q. And can you place, do you remember any particular conversation to that effect?

A. We had a conversation to that effect, being that if anybody came in to apply for a job, and being that I was more acquainted with the type of work and the type of manufacturing that was going on in this place here, I would more or less be able to judge from the conversation of the interview, or from [587] the experience of the applicant, whether they would fit in with this type of operation or not, and whatever information I obtained I turned it over to Mr. Fellman. [588]

* * *

Q. Now, there was a girl here, I believe, a colored girl by the name of Parker that testified sometimes you instructed her what to do or how to do it, when she was working in the Trina factory in Venice, this year. Do you recall a Miss Parker?

A. Yes; I recall Miss Parker.

Q. Did you ever give her any instructions as to how to do the work?

A. Not in the sense, in the term of instructions. I may have showed her how to do something if I happened to notice that she wasn't doing it right. I just merely walked over and showed her the proper way of doing it, but not in the form of instructions. [590]

(Testimony of Jack Lewis.)

Q. Did you go into the Trina factory from time to time? A. Occasionally.

Q. And did you observe the production that was going on? A. I did.

Q. As far as you knew, was Trina devoting its entire production to orders from California Footwear? A. That's right.

Q. Did you ever inspect the work in process in Trina plant, which was destined to go to California Footwear? A. I did.

Q. Did you ever give Miss Parker any orders as to how she should do her work?

A. I never gave her any orders. I merely showed her how to do it on occasions. Sometimes if I seen she wasn't doing it right, which would result in a reject of some shoe or something, I merely pointed out this is the wrong way of doing it and showed her how to do it the right way. But at no time ever gave her any instructions. [591]

* * *

Q. Mr. Piasek said that you used to pick up job tickets showing the amount of work turned out by piece-workers, and took them in the office so that they could figure wages. Did you ever pick up job tickets? A. Yes; I did.

Q. Did you take them into the office?

A. Yes, sir; I did.

Q. Why did you do this, Mr. Lewis?

A. For one reason, I have plenty of time on my

(Testimony of Jack Lewis.)

hands in the office. I help figure out the payroll cards for Mr. Fellman at which time, which was usually done a few days before payday, anyway, and Mr. Fellman would check over my figures the following evening or following day. That was one reason, and the second reason, I had to determine how much money I would have to advance him for his payroll so I would know just how much money is required.

Q. California Footwear was supplying money for Trina to meet current payrolls with; is that true?

A. California Footwear was advancing the money for the payroll for Trina Shoe Company.

Q. It is your testimony, then, you needed to know how much [600] his requirements were to meet certain payrolls? A. That's right.

Q. That was one of the reasons why you picked up the job tickets? A. That's right.

Q. Mr. Piasek said on some occasion or other, when he thought his check was short he told you about it; is that correct; is that a fact?

A. That's right.

Q. What did you do about it after he told you about it?

A. After I took out all his work tickets and we went over the figures, Piasek and I, the figures and additions and multiplications and so on and if we found any error we adjusted it and we gave them the difference. [601]

(Testimony of Jack Lewis.)

Q. Has any decision been made by California Footwear as to what it would do as to getting a source of supply of shoes after the first of the year, in the event that Trina doesn't continue to supply them?

A. Yes; the decision on that is this: If Mr. Fellman terminates his contract with California Footwear Company and then California Footwear Company will try to do a little of manufacturing on its own until they will be able to find or locate somebody that will be able to take over the factory to do the manufacturing for the California Footwear Company.

Q. Has anything final been decided on that as to what will be done, exactly?

A. Well, that is the decision we will try to go on to do manufacturing on our own until we find somebody that will be able to take it over, take it off our hands.

Q. What about if you are able to find somebody to take up immediately at the first of the year, somebody that is satisfactory, would it be your plan that California would not do any manufacturing in that case?

A. No; California will not do any manufacturing if we are able to find somebody worthwhile and somebody satisfactory that can take over the manufacturing process from our hands.

Trial Examiner Hemingway: You mean in the same location?

(Testimony of Jack Lewis.)

The Witness: Yes. [606]

* * *

Q. But you didn't move out to Venice solely because of the rent. You say a second item was transportation, which was connected with your health?

A. That's right; everything put together.

Q. Well, you say now, everything put together. What was there besides the amount of rent and your transportation problem?

A. Well, as I said before, my health condition and increase in rent and everything put together made me decide it.

Trial Examiner Hemingway: When you say "everything put together," are you thinking of anything more than those two things?

The Witness: No; primarily it was my health. That is the most consideration and the increase in rent. That was a contributing factor. No; I don't mean anything else, considering [610] everything together, I mean.

Q. (By Mr. Smith): Were you concerned about a cheaper labor market area?

A. I would like to find a cheaper market [611] area.

* * *

Q. During the last three or four weeks, what has been Mr. Fellman's function about the plant, has he continued in general charge of the plant?

A. Well, he has continued as far as the general charge of the plant is concerned, except he doesn't

(Testimony of Jack Lewis.)

spend very much time in the plant. He has been out a great deal looking for another location for space available, so he can move out.

Q. Up until that time, or saying it differently, for the first nine or ten months of this year he has been spending full time in the Venice plant?

A. That's right.

Q. And through that same period you had been spending full time in that plant, also? [622]

A. As much as I was able to; yes.

Q. That amounted to something like four out of five days each week; did it not?

A. About, yes; sometimes three, sometimes four days a week.

Q. Mr. Levitan throughout the whole period, up until today, has been spending his full time in the plant? A. That's right.

Q. Mr. Albert Lewis, also?

A. That's right.

Q. You say Mr. Fellman has been out a good deal, looking in the past month?

A. About two or three weeks. [623]

* * *

Q. In your dealing with Trina, were you the one who made the agreement to purchase shoes from Trina?

A. Yes; primarily. My partner had knowledge of it, of course.

Q. When you gave your specifications to Trina for shoes, did you also specify the price at which they would be paid?

(Testimony of Jack Lewis.)

A. The price they were to be made by Trina?

Q. The price you would pay Trina for [634] them?

A. Not specific, they were arriving at a general figure the particular style to be made at a particular price.

Q. Do you mean that each time you start a new style you get together with Mr. Fellman and talk about the price?

A. That's right. In other words, not all styles can be made for the same price.

Q. And did he and you decide at that same discussion what the price would be?

A. Yes; sometimes it was subject to revision, providing if we weren't a little too clear on it, and the figures might be a little off. Then what we figured, we make a little provision to have an adjustment after.

Q. Was there any fixed amount that was agreed upon as the value of technical advice?

A. In dollars and cents you mean?

Q. Yes. A. No.

Q. Now, did that enter into the amount that you would owe Trina for the shoes that the Trina Company manufactured?

A. If a portion of technical advice entered into the general set-up, the advice that we were to give him we determine was part, well, you might call it, it might be a part of the price of the shoe, but we never did——

(Testimony of Jack Lewis.)

Q. Here is what I am trying to get at. If an accountant were to go over the figures, would he find the value of technical [635] advice in any specific place?

A. No. In other words, he wouldn't find a separate column or separate bill or separate item.

Q. So it wasn't set off to charge against the shoes? A. Not technical advice; no.

Q. What about that other, the use of your equipment that was also to be taken into account in fixing the price of shoes, was there any value set on that?

A. No; that was arrived at to use a certain portion of our equipment as he sees fit. If there is any rentals on that, why, he has to pay the rental on it. No rental was given as a separate rental for equipment of our own. In other words, the rental of the place we charged Trina for, covered the rental of the place and the utilities and the portion of the equipment that he found use for.

Q. Well, then, this clause in the agreement, General Counsel's Exhibit 4, paragraph 4, "In the event that buyer furnishes seller use of buyer's machinery, a reasonable allowance shall be made for the value of its use."

You say that that was not done, that it was actually thrown in free with the rent?

A. Well, it isn't free with the rent. I mean the whole thing was taken into consideration.

Q. Taken into consideration of what?

A. Of part and parcel of rent that we got for the space, but [636] it wasn't a definite loan-free.

(Testimony of Jack Lewis.)

In other words, if we would find somebody that would want to buy certain equipment or we could sublease to somebody else, we had a perfect right to take it out from there and give it to anybody we wanted to. In other words, it was free for him to use while it was standing there, but we were not obliged that it belonged to him, but he was to use it at all times. [637]

* * *

Q. Did you ever see any of Mr. Fellman's figures, with respect to the cost of manufacturing and the price which he would have to get to make a fair margin of profit?

A. Yes; I have seen those figures.

Q. Well, now, did you take those figures and knock something off for technical advice and use of machinery, or just how was that done?

A. That was done generally into what you might call buyer and selling bargaining. I would offer a little less and he would compromise a little and he would compromise a little and arrive at terms, and that is the way we arrive on certain figures, so that both sides should be happy.

Q. Did you advance any money to Mr. Fellman, other than for the cost of operations?

A. No, sir.

Q. Can you explain to me how the amount advanced to Mr. Fellman has grown to something near to \$11,000.00, if he was being paid a price which would cover cost of operations?

A. Oh, yes; very simple. On merchandise that I bought, we charged off to Trina Shoe Company.

(Testimony of Jack Lewis.)

Money that he needed for payroll, we would advance the cash for it. On the other hand, [638] the merchandise that was made up, Trina would bill back to California Footwear and this portion would set off whatever the California Footwear Company charged to Trina or advanced in money. However, that was only applied when merchandise was finished. However, certain inventories that is in process and it was not cut yet, or did not go into process yet, and that money is not charged to California Footwear Company yet and this would still be on the Trina Shoe Company property and that is where a balance like that would arrive.

Q. Have you any idea how the balance would be affected by the completion of manufacture of shoes from whatever material is on hand at the present time?

A. It is really hard to tell, because you have to take accurate inventory and whatever merchandise has been made up since up to the present time and what he charged back.

Q. I don't want an accurate statement on that. All I am trying to figure out is this, if you utilized all of the leather and other materials on hand at the present time and wound up this contract, would it reduce that \$11,000.00 debt by half, two-thirds, or just rough proportion?

A. I think it would even up, or maybe come out a little—might even up, I think, I hope so, [639] anyway.

(Testimony of Jack Lewis.)

Q. When you paid the Bank of America, was that by your own check?

A. No; that money was advanced to Trina Shoe Company.

Q. That is what I am talking about. Did you have a list of the figures that totaled up to \$3,500.00 that you gave Trina, the money to discharge that amount?

A. There were a certain number of debts that would amount up to that figure.

Q. Do you remember any item, except the Bank of America note that entered into that?

A. Anything—by item, you mean big or small item?

Q. No; the big item is the Bank of America note. The item that goes to make up the difference between \$2,600.00 or \$2,800.00, whatever the Bank of America note was, and the \$3,500.00.

A. Yes; I think there were several. One of them, I think, was a month's back rental on his old location that he owed money to, and some of it was in taxes, portion of taxes, I think, that were coming on the one or one and a half per cent withholding that they had to meet that was falling due from his previous [642] Costa Mesa debts.

Q. Did the amount cover the cost of moving?

A. I don't recall. I don't think so, no; I don't recall. [643]

* * *

(Testimony of Jack Lewis.)

Redirect Examination

By Mr. Perkins:

Q. One of the subjects the Examiner touched on here, in Los Angeles Street you have machinery which was leased from United Shoe Machinery and some other companies? A. That's right.

Q. That is over a definite period they are leased for?

A. Leased for a period of ten years.

Q. And not cancelable by you during that period?

A. Unless we pay off the full ten-year rental.

Q. So that as to machinery covered by a lease from United Shoe or somebody like that, that had some time to run; did you move that machinery to Venice? A. Yes; I did.

Q. And you let Trina use it? A. Yes.

Q. And who pays the rent on that to United Shoe Machinery? [644]

A. California Footwear pays rent to the United Shoe Machinery but California Footwear charges that portion of rent to Trina Shoe Company for the same amount.

* * *

(Testimony of Jack Lewis.)

Recross-Examination

By Mr. Smith:

Q. You say you and Mr. Fellman had an oral agreement worked out with reference to the content of sublease and the other documents that you signed in January, and, I think, one of them somewhat later this year. I will ask you whether part of that oral agreement was the amount of rental that Mr. Fellman was to pay to you in connection with the sublease? A. Yes.

Q. What was that amount?

A. The rental originally that we arrived at, I believe, would be \$250.00, but I think later we changed it orally between ourselves. We made it \$200.00. [645]

Q. Now, I call your attention to the fact that the sublease gives the amount of \$275.00 for the first two years and after that \$300.00. Was that the original agreement? A. Yes.

Q. You say that later it was changed?

A. Yes.

Q. When? You mean after the writing was entered into?

A. After the writing was entered in, we changed it, that is, orally we changed it to \$200.00 a month.

* * *

Trial Examiner Hemingway: Maybe I am confused on this, but let me see. I would like to ask whether or not that adjustment of the rent, orally,

(Testimony of Jack Lewis.)

was made on the basis of a division of space occupied by Trina and California Footwear.

The Witness: Part of it was. It went into the discussion [646] at that time that we were taking a little more space than we actually told him we would need, and with that in mind we agreed to lesser rent and didn't want to go through the trouble and another expense to rewrite the agreement, so we just agreed on an agreement for \$200.00.

Q. (By Mr. Smith): What additional space did you occupy, different than that set out in the sublease?

A. Not any more different space, but we were taking up more space by the inventory that we were keeping and boxes and cartons, and everything, they were taking up more space.

Q. I don't quite understand that. How much more space and where in the plant?

A. In the plant nearer to the portion of the plant nearer to the office and to the shipping. [647]

* * *

Mr. Smith: I propose the stipulation that all of the machinery at California at the time of the move of the machinery from California to the Trina Venice location was moved and that no other disposition was made at that time of any of such machinery.

Mr. Perkins: That is correct.

I suggest the following supplement that as to the machinery which California Footwear had leased

from others as, for example, United Shoe Machinery, whenever the leases expired on machinery it was returned to the lessor and [654] further that at the time machinery was moved from California Footwear's plant on Los Angeles Street to Venice, the Trina operation was already under way with machinery brought from Costa Mesa.

Mr. Smith: Yes; that is agreeable.

* * *

MAURICE FELLMAN

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Perkins:

Q. Mr. Fellman, you are president of Trina Shoe Company? A. That is correct.

Q. Have you been president of that company since its formation? A. Yes.

Q. And Trina was formerly in business in Costa Mesa, California; was it not? A. Yes, sir.

Q. That is in Orange County?

A. Yes. [655]

* * *

Q. * * * Did you go to work for California Footwear in the fall of '52? A. Yes; I did.

Q. And doing what kind of work? [656]

A. Pattern work, sample work.

Q. At that time was the operation at Costa Mesa

(Testimony of Maurice Fellman.)

actively running or was it suspended or what as far as actual production was concerned?

A. It was suspended when I left.

* * *

Mr. Perkins: I propose the following stipulation of fact in the belief that it will shorten presentation of evidence in eliminating extended examination of witnesses. The following figures are taken from a financial statement [657] of Trina as of August 31, 1952. Total assets were \$20,167.05; total liabilities were \$4,202.72. That leaves a book net worth of \$15,964.33. Now for some detail concerning assets, current assets are shown at \$9,229.27. Of that, cash in the bank is shown as only \$4.72. There are no other cash items included in the current assets. Fixed assets, \$6,466.29. That includes the item of machinery and equipment, the cost of which is shown at \$8,810.15.

The Witness: Excuse me, actually, that isn't the cost, it is the depreciative value at the time of the incorporation.

Mr. Perkins: I see. It was the evaluation placed on the machinery and equipment when it was transferred to the corporation.

The Witness: Yes.

Mr. Perkins: Then, there is a reserve for depreciation of \$3,389.84.

If I may ask the witness, that represents a further depreciation since the inception of the corporation; is that correct?

(Testimony of Maurice Fellman.)

The Witness: Yes.

Trial Examiner Hemingway: Is that the depreciation from \$8,810.00?

Mr. Perkins: Yes, since the inception of the corporation. The reserve is \$3,389.84, leaving a net depreciation value on August, 1952, \$5,420.31. Then there were other assets and [658] deferred charges amounting to \$4,471.49.

So that this will be understood better, I am reading the transcript, I will say the total asset figure of \$20,167.05 is a result totaling three subtotals, namely, current assets of \$9,229.27, fixed assets of \$6,466.29, and other assets and deferred charges of \$4,471.49.

Now, under liabilities, the total of which has previously been given as \$4,202.72, they include the following items, among others: notes payable the Bank of America, \$490.00; social security tax payable, \$455.26; withholding tax payable, \$740.36.

We will add to that the explanation it is our understanding the amount paid the Bank of America to release the chattel mortgage which it held on the equipment was this sum of \$490.00 with the possible addition of interest subsequently accruing.

Mr. Smith: That is to say subsequent to August 31, 1952.

The Witness: I don't think that is correct. It was a lesser figure.

Mr. Perkins: \$490.00

The Witness: Paid at what time?

(Testimony of Maurice Fellman.)

Mr. Perkins: Late in '52, whenever it was paid.

The Witness: You mean final payment to the bank?

Mr. Smith: Less than \$490.00; is that right?

The Witness: Yes.

Mr. Smith: We are satisfied with the stipulation in that [659] form.

* * *

Mr. Perkins: Then the operating statement for the fiscal year ended August 31, '52, showed the following figures among others: Sales of finished shoes for resale, \$15,703.85. The operations for that fiscal year resulted in a loss of \$9,308.90.

All of these figures covered by this stipulation relate to operations of Trina at Costa Mesa.

Mr. Smith: So stipulated.

Q. (By Mr. Perkins): Now, there came a time when you moved [660] the operations and equipment of Trina from Costa Mesa to Venice; did there not? A. Yes, sir.

Q. And approximately when was the equipment moved? A. In December of '52.

Q. And when did production begin at Venice?

A. I would say within a week of the moving.

Q. Would that still be in December or January?

A. I couldn't pin it down, it would be one side or the other, slightly.

Q. Around the first of the year? A. Yes.

Q. Now, did you have a conversation with any of the, either of the partners of California Footwear before you moved your furniture, your equip-

(Testimony of Maurice Fellman.)

ment to Venice concerning your moving Trina's operation out there?

A. Have a conversation in regard to that, you mean?

Q. Yes. A. Yes.

Q. Approximately when would be the first discussion that you had with them concerning the project of your moving Trina's operation to Venice, approximately?

A. I would say around the early part of December. [661]

* * *

Q. What was your suggestion that you made when you first brought up the idea? [662]

A. It would be along the idea of Trina making shoes for California Footwear.

* * *

Q. Were there later discussions on the same subject? A. That's right.

Q. Where did you get the idea or what gave you the idea to suggest to them the project of Trina making shoes for California Footwear?

A. Well, I would say the whole general situation of both Trina and the situation that prevailed with Jack Lewis and Joe Levitan regarding their operation and it seemed to lend itself to the thought.

Q. What was there in Trina's situation that suggested the project?

A. The factory doing nothing, lack of [663] money.

* * *

(Testimony of Maurice Fellman.)

and gave them to him and then he showed me the dues books and in looking at the dues books I found what seemed to me discrepancies and I said I was going to check them.

Trial Examiner Hemingway: Discrepancies on what?

The Witness: The fact that they were paid up dues books of people who were working at Trina where we had no checkoff; dues, to my understanding, are paid to a union through a checkoff. I went out in the shop and inquired of one of the dues book names if the book was in order and was told it wasn't.

Q. (By Mr. Perkins): Who did you ask?

A. Charles Quesenberry.

Q. Was his name on one of the dues cards shown to you? A. Yes, it was.

Q. You asked him what?

A. If he had paid his dues, was a paid up member and he said no. I believe Herlinda Hernandez was another and I asked if the two of them, they were quite friendly, I [679] asked if that applied to Herlinda also and he said it did. I went back to the office and Mr. Tutt told me I had no right to do this. [680]

* * *

Q. Then he came back another time, did he, after that?

A. Yes, he came back very peacefully, surprisingly, and I said I thought you were going to come in getting tough which he seemed to have forgotten

(Testimony of Maurice Fellman.)

all about and asked about a number of employees again and I told him that I wasn't playing the game that way until they played the matter square as far as the thing that didn't look right to me was concerned and any other conversation was along the same order. [681]

* * *

Q. Now, is the packing room part of the premises leased by Trina from California Footwear?

A. Yes.

Q. And how are the finished goods—withdraw that.

Are the finished shoes put in boxes before the delivery? A. Individual?

Q. Individual shoe boxes, yes? A. Yes.

Q. How are they moved to the point in the packing room where California Footwear takes delivery?

A. By rack or boxes.

Q. Just on hand truck, how are they actually, physically [699] moved? A. Carried, pushed.

Q. Anyway, there is no power machinery involved in it? A. No.

Q. Do those boxes of shoes, are they stacked up there in the packing room? A. Yes.

Q. And then does California Footwear remove them from time to time? A. Yes.

Q. Now, who does that for California Footwear for the most part? A. The individual?

Q. Yes. A. Mr. Levitan.

Q. Do Mr. Lewis and Mr. Levitan ever come into the part of the factory where the production is car-

(Testimony of Maurice Fellman.)

ried on? A. Yes, they do.

Q. From time to time? A. Yes.

Q. Would they observe the operations going on?

A. They would.

Q. Now, did they inspect the product as it was in process? A. They did. [700]

* * *

Q. Now, to your knowledge did Mr. Lewis or Mr. Levitan ever show any of the Trina employees how to perform a particular operation?

A. Yes, they have.

Q. Did you make any objection to that?

A. No, I did not.

Q. Do you have any opinion as to whether or not it was desirable from Trina's point of view that Mr. Lewis or Mr. Levitan would show Trina employees how to perform an operation? [701]

A. As a rule it would be. [702]

* * *

Q. When Trina was shut down or when it had suspended operations in '52, did it have the working capital with which to resume operations?

A. No, that is why it was shut down.

Q. It didn't have, is that right? A. Yes.

Q. Now, did you seek any source of credit, source of funds other than California Footwear in order to try to put Trina shoe back in production?

A. Yes, I did.

Q. And what source did you resort to for funds?

A. Banks.

(Testimony of Maurice Fellman.)

Q. Were you successful in that venture?

A. No, I was not. [703]

* * *

Q. (By Mr. Smith): What was your understanding as of mid-December as to the amount of rent which you were to pay under the sublease?

A. The understanding at that time was the amount of rent that was charged to them was given to me and it was understood that I would pay a rent that would be proportionate to the space I would occupy so that it couldn't exceed the \$275.00.

Q. Was that proportion to be on a square foot basis?

A. I don't think anybody mentioned square foot, we just said the proportionate amount.

Q. As of the time that you signed the sublease in January of 1953, did you expect to occupy the entire premises? A. No, I didn't.

Q. I will ask you then why you signed a sublease for a payment of \$275.00 per month rent?

A. Why I signed it? [710]

Q. Yes.

A. The making of the sublease was done to charge me with the same terms, I would say, at least, that is the way I saw it so I would be subject to the same conditions that they were subject to in the master lease and the \$275.00 figure, I think, rubbed in. I didn't like it and I objected to it.

Q. You objected at the time of the signing, is that right? A. Yes.

(Testimony of Maurice Fellman.)

Q. Were you unsuccessful at getting it changed at that time?

A. No, I wouldn't say unsuccessful. We still had this agreement that I was to establish a rent on the basis of the space occupied.

Q. And you can't remember when that change was made, the reduction from \$275.00 to \$200.00?

A. That's right. I think it was right from the beginning.

Q. In other words, your first month's rent rate was at the rate of \$200.00?

A. \$200.00, yes, sir. [711]

* * *

Q. Well, then, if they are to the extent that you recall such subject matter having been discussed, what was said between you and Mr. Jack Lewis?

A. What had been said was that there were certain employees at California Footwear who, if they could be available, I would like to have out there at Venice.

Q. Is this you talking or Mr. Lewis talking?

A. This is me. [712]

Q. Did you name certain individuals?

A. Yes.

Q. Who were they?

A. Blanche was one, Miss Blanche Roark.

Q. Go ahead, who else?

A. Ed Morris is another, Charles Quesenberry, Herlinda Hernandez. Those were the four that I was principally interested in.

(Testimony of Maurice Fellman.)

Q. I will ask you whether Annie Bell Stamps was another name that you mentioned?

A. I probably didn't mention her, no.

Q. How about Jesus Estrada?

A. Yes, I would have mentioned Estrada.

Q. Do you recall anybody else?

A. No, I don't.

Q. What did Mr. Jack Lewis say with respect to that question when you discussed it with him?

A. I don't recall because I don't recall discussing it. I say I know that this took place because they were people who were good workers and skilled on their jobs.

Q. Among others, you did actually employ at Venice Quesenberry, Hernandez, Stamps and Estrada, did you not?

A. That's right. [713]

* * *

Q. Now, continuing with Blanche Roark, you testified to her coming out to the plant. I think you were not sure of the date but she testified it was February 9th. Does that sound [716] about right?

A. I couldn't say.

Q. But it was the trip out to the plant where she was accompanied by Mr. Tutt and by the Morris, is that correct?

A. That is correct.

Q. Ed Morris and his wife?

A. Correct.

Q. And in your direct examination you didn't tell us who was present at the precise conversation in which you said you offered her a job. Can you recall who else was standing there participating or

(Testimony of Maurice Fellman.)

overhearing the conversation besides yourself and Blanche Roark?

A. It seems to me that when the group first entered the office, I believe I was in the office when they entered, and I think that the whole thing opened that way with Blanche saying, "Have you got a job for me," or something of that sort. [717]

* * *

Q. And all that you can tell me about the conversation concerning her going to work for Trina was simply her question of, "Have you got a job for me"?

A. Yes, and my telling her yes. [719]

* * *

Q. As I understand your testimony, you stated on direct examination that California took over the shoes in the packing room. What is done with the shoes after the point of take-over, whenever that fine line is, what does California do with the shoes?

A. Ships them.

Q. And how is that shipping handled now with respect to any physical operation with respect to any employee, do they perform any operation with respect to the shipping? How is that done?

A. The making of the shipments, the selling of the boxes?

Q. Yes, who performs all those operations until the time the shoes are out of the factory?

A. Joe Levitan, I would say.

Q. Does he handle all of that?

A. He handles all of it, to my knowledge.

(Testimony of Maurice Fellman.)

Q. You mean all the packing of the shoes?

A. I am talking about the placing in the cartons, the [762] selling of the cartons

Q. He does all of that work?

A. Yes. [763]

* * *

Q. During the last three weeks have you hired any employee at Trina?

A. In the last three weeks?

Q. Yes.

A. In the last three weeks, I don't believe that I have interviewed any.

Q. Well, I want the question to go beyond interviews. I am getting at any part of the hiring process.

A. I have checked over everything that has happened.

Q. You have approved certain hirings after the fact of their being made, is that correct?

A. That's right.

Q. How many cases?

A. There have been possibly four or five.

Q. Were all of those four or five individuals put on the [769] payroll, or hired, by a particular individual out at the Trina site?

A. I don't know whether they were hired by a particular individual, say, either Joe or Albert, possibly.

Q. You don't know the details about the four or five but it is your judgment that all those people were hired by either Albert Lewis or Joe Levitan?

(Testimony of Maurice Fellman.)

A. Put on by one or the other. [770]

* * *

Q. Have you given any consideration to continuing your manufacturing operations at the site of your present plant [775] but in some arrangement other than a buy and sell agreement with California?

A. Yes, I have given the whole thing a lot of thought and I will say at this point, I haven't really come to any definite conclusions, not even to a real definite conclusion as to discontinuing the agreement with California Footwear. I have some definite thoughts as to what I want to do in the future if they can be worked out.

Q. You still owe a considerable balance to California in your dealings between the corporations, is that correct?

A. I wouldn't call that considerable. I don't know the exact figure right at present.

Q. You have testified that you terminated Martin Zell. Any other terminations that have occurred during the last three weeks have been effected by either Albert Lewis or Joe Levitan, is that correct?

A. Yes.

Q. And there have been some subsequent, is that not also correct?

A. That's right.

Q. During this three weeks period—strike that.

During those days during this three weeks period when you have been absent either for a whole day or a part thereof who have you left in charge of the factory?

(Testimony of Maurice Fellman.)

A. Albert Lewis has been in charge. [776]

* * *

Q. Let me ask this, during the first three or four months of this year but after the California machinery was moved over to Trina there were a good many of the machines that were idle for some time, isn't that right, because of excess of machinery at the Trina plant? A. Yes.

Mr. Smith: That is all.

Trial Examiner Hemingway: Do I understand by that that you mean duplication of machines?

A. Not necessarily. Machinery that is idle because its use is not required in the particular items at the moment for various reasons.

Q. Were there duplications, too?

A. There were duplications also, principally duplications in lease equipment.

* * *

Trial Examiner Hemingway: Do you mean the equipment you were leasing from California or California leasing from somebody else?

A. California was leasing from somebody else.

Q. And were you paying the rental for those machines at Trina? [782]

A. At the present location?

Q. Yes. A. Yes.

* * *

Q. Was there any reason why it was necessary for you to move from Costa Mesa under a sales agreement, couldn't you have manufactured the same shoes at Costa Mesa?

(Testimony of Maurice Fellman.)

A. I believe it could have but perhaps not agreeably to all the parties.

Q. Well, if I understand you correctly, you are saying that you could have manufactured the shoes but California wanted an arrangement whereby it would be manufactured [783] at Venice, is that right?

A. They wanted an arrangement whereby they could have a closer inspection of the work.

* * *

Q. I was just wondering whether or not that should be—strike that.

When you manufactured shoes as Costa Mesa how did you figure the price that you had charged for them?

A. Well, the general way you figure your price is by figuring the amount of material that would go into a pair, [784] the cost of the material, the price of the labor, the amount of anticipated production with the overhead to be offset.

Q. Did you have in mind any exact overhead figure? A. At Costa Mesa?

Q. Yes. A. Yes.

Q. And did that include an allowance for depreciation of equipment?

A. In basing my cost?

Q. Yes.

A. I didn't take it too much into consideration, I would say, that is, not in the last year, let us say.

Q. Do you recall how many times you had to

(Testimony of Maurice Fellman.)

deal with California with respect to the price of shoes which you were manufacturing during the period of 1953?

A. The number of occasions on which a price had to be set?

Q. Yes.

A. Well, let's see, at the beginning there was one meeting at which a number of shoes were agreed upon as to price. Repeatedly throughout the year there were new shoes and new prices.

Q. When there was a new type of shoe that came in who would be the first one to broach the subject of price?

A. I would say that Lewis put the question to me.

Q. Just how would he put it? [785]

A. Well, there would be occasions where he would bring in a shoe and would ask me what it would cost to have it duplicated.

Q. Did you do any calculating before answering or did you just give him a snap answer?

A. Before any definite price, yes, there was always a certain amount of calculating by comparison of a particular shoe with another in the same general category that I was pretty well familiar with that I would be able to give a snap price subject to possible differences one way or the other.

Q. Were you able to give the snap price because of some prior experience you had had at Costa Mesa with the same type of shoe?

(Testimony of Maurice Fellman.)

A. It would depend on the type of shoe. If it were a shoe of the type that I had made in Costa Mesa, naturally, I would draw on that experience.

Q. In other words, you would fix a price comparable to a price that you had once used in Costa Mesa?

A. Oh, no, not fix. You were referring to a snap estimate but the fixed price——

Q. You state the price wouldn't be fixed until it was pretty thoroughly analyzed? A. Yes.

Q. Well, who did the analysis? [786]

A. Myself.

Q. What did you take into account in figuring that?

A. The amount of material that would go into an average pair, the price of that pair together with all those costs that attended to it, transportation, outside labor, and then the various operations that would enter into the manufacture of the shoe with an estimate, of course, for each operation and totaling of these items.

Q. In other words, you gave Mr. Lewis a price based upon cost? A. Based on cost, yes.

Q. Well, did you include anything else in your figuring of the price?

A. Yes, all the cost of the shoe.

Q. Have you named everything that went into the price, that is what I am asking.

A. No, there is the profit to be anticipated.

Q. Did you have in mind any particular figure by way of profit?

(Testimony of Maurice Fellman.)

A. Yes, it was a happy figure to be looked for. Sometimes you make it, sometimes you don't.

Q. I am just talking about computation for price that you are going to ask. When you get all through figuring up the cost, then do you add a certain percentage by way of profit and then come up with the final figure?

A. No, in this case, in the dealings with California [787] Footwear it did not deal with percentage because it was a smaller item than that, it would be a smaller item than that anticipated profit.

Q. I don't understand what you mean.

A. By percentage, if you brought it down to percentage, it might be two, one, or perhaps even less in percentage and working was that close.

Q. Was that a lesser percentage than you used when you were figuring prices at Costa Mesa?

A. Yes. [788]

* * *

ERNEST TUTT

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

* * *

Direct Examination

By Mr. Perkins:

Q. And the request was to bring from the union's records copies of any and all correspondence during the year 1953 addressed to employees of Trina Shoe Company in any way concerning possi-

(Testimony of Ernest Tutt.)

ble union discipline of those persons. Is that what you understood to be the scope of the request?

A. That's right.

Q. And have you produced the documents requested? A. Yes, I have.

Q. They are contained in this folder?

A. They are.

Q. Which includes four sets, copies of letters, each [795] stapled together, that is, each set stapled together? A. That's right.

Q. The addressees are Jesus Estrada, Herlinda Hernandez, Charles Quesenberry and Annie Bell Stamps, are they not? A. That's right.

Q. Now, the file contains copies of four letters, each to a different addressee and dated March 30, 1953, does it not? A. It does.

Q. The text of the letters dated March 30th, is identical except for the name and address of the addressee, is it not? A. That's right.

Mr. Perkins: Mr. Examiner, may I read this rather short letter into the record? We are trying to hurry up here.

Trial Examiner Hemingway. Let the reporter copy it.

Is there any objection to that being in evidence?

Mr. Smith: I think it's immaterial and that would be our contention in argument but I won't object to it coming into the record.

(The following letter was copied.)

(Testimony of Ernest Tutt.)

“Charles J. Quesenberry,

“356 Mariana Street,

“Puente, California.

“Dear Brother Quesenberry:

“Many members of the organization are now demanding that the union take immediate and [796] drastic action against you as a union member because of your failure to aid the union in any way whatsoever in its dispute with the Trina Shoe Company (California Footwear) Company.

“Charges of this nature if proven would constitute a very bad mark on your record and could mean a stiff penalty or even expulsion from the union.

“I have temporarily been able to get the members to hold in abeyance any formal written charges against you because I have told them I intend to talk over this situation with you.

“I would therefore like to meet you at union headquarters on Wednesday, April 1st, at 6:00 p.m.

“I trust you will be here so that this matter can be adjusted.

“Fraternally,

“ERNEST TUTT,

“International Representative.” [797]

* * *

Q. (By Mr. Smith): Carrying that one step further, have these four individuals ever been suspended for nonpayment of dues or any other reason?

A. They were later suspended.

(Testimony of Ernest Tutt.)

Q. At what time?

A. That would be sometime during the summer of this year, approximately July.

Q. For what reason were they then suspended?

A. Because they were no longer in good standing as union members.

Q. And why were they no longer in good standing?

A. Because their dues had not been paid for several months after February and March. [799]

* * *

ALBERT LEWIS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [813]

* * *

Direct Examination

By Mr. Perkins:

Q. There is testimony on this record that at various times that Mr. Fellman has been away from the plant that you had [819] been in charge of the plant, is that correct? A. That is correct.

Q. That has been especially true in the last month, has it not? A. Yes, it has.

Q. I mean by that that Mr. Fellman's absence from the plant had been more frequent in the last month than they were in the several months before that? A. Yes, sir. [820]

* * *

JOSEPH LEVITAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Perkins:

Q. Mr. Levitan, you are one of the [826] partners of California Footwear? A. Yes, I am.

Q. Were you a partner when California Footwear was in the manufacturing business on Los Angeles Street? A. Yes, sir.

Q. Now, are you a, have you been engaged in operations of California in Venice?

A. California Footwear Company?

Q. Yes. A. Yes.

Q. What has been your work at the Venice location?

A. My work has been principally in taking over the shoes manufactured by the Trina Shoe Company, designing them, packing and supervising so that they go out in the proper shape. Also, in helping, assisting Mr. Fellman in any shape or form he may see fit.

Q. Do you inspect the shoes manufactured by Trina for California Footwear?

A. Yes, I do inspect them through every stage. By this, I mean I would discuss the shoe with Mr. Fellman and ask him whether the cutting was done right and whether the stitching was done right, every step; whether the cementing was done right. You could see me go over in the place and lift up

(Testimony of Joseph Levitan.)

a pair of shoes when there was a half hour's work done on them and examining them to see whether the stitches were right or [827] whether the size was marked right and I would go over to Mr. Fellman and ask him what it's all about, if it would come out all right or if it wouldn't come out all right to avoid rejects later on. When they can be repaired is when they are still in process but not later on.

Q. So you did perform inspection at times on the production line? A. Yes. [828]

* * *

MAURICE FELLMAN

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Fellman, you are acquainted with the fact of recall of Jack Rosenthal to work for Trina Shoe Company? A. Yes, I am.

Q. On November 21st, is that correct?

A. That is probably the date. I am acquainted with the facts.

Q. Was that recall by a telegram?

A. That's right.

Q. And did you send that telegram to Mr. Rosenthal? A. Yes, I did.

Q. Was it your idea to recall him to work?

A. On the advice of counsel.

(Testimony of Maurice Fellman.)

Q. By counsel, do you refer to Mr. [936] Perkins?
A. Yes.

Q. Will you describe for me each and every conversation that you had with Mr. Perkins or with Mr. Lewis or Mr. Levitan that preceded your sending this wire that related to calling Mr. Rosenthal back to work; first of all, what conversation did you have with Mr. Perkins?

A. Well, the conversation, as I recall, wasn't a lengthy one, just a question of what to do about putting the cutter back to work.

Q. When did this conversation take place?

A. I don't recall the date.

Q. Can you place it as best you can, how many days before the date of the wire?

A. I believe it was the same day.

Q. The same day. Was the conversation by telephone or in person?
A. In person.

Q. Where did it occur?

A. In the office of the Trina Shoe Company.

Q. Who was present?
A. Mr. Perkins.

Q. And yourself?

A. Myself and Mr. Lewis was there.

Q. You refer to Mr. Jack Lewis?

A. That's right. [937]

Q. Anyone else?
A. I don't believe so.

Q. First of all, was this the only conversation you had with either Mr. Jack Lewis or Mr. Perkins about the matter of recalling Mr. Rosenthal?

A. Yes.

Q. Explain what was said and by whom?

(Testimony of Maurice Fellman.)

A. It was a very brief thing, a question of who to hire and who to call back for the cutting and asking Mr. Perkins if he thought it advisable to call Mr. Rosenthall back.

Q. Who asked Mr. Perkins? A. Myself.

Q. You asked him who to call back?

A. Yes.

Q. And what did Mr. Perkins say?

A. He thought it advisable to call Mr. Rosenthall back. [938]

* * *

EUGENE PIASEK

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

* * *

Direct Examination

By Mr. Smith:

Q. Beginning in that period and through the next month or two, did you make any trips to the Trina plant to seek work?

A. Yes, I was a couple times over there.

Q. In the month of October did you make any such trips? A. Yes.

Q. On what date in October?

Mr. Perkins: What was the answer?

The Witness: Yes, I made a couple trips.

My first trip was October 23rd—it was a week before October 23rd, my first trip.

(Testimony of Eugene Piasek.)

Q. (By Mr. Smith): And did you make another trip on October 23rd? [956]

A. That's right.

Q. On October 23rd did you talk to any company supervisor or representative?

A. Yes, I did talk to Mr. Maurie Fellman.

Q. Go ahead and tell us to whom you talked and what was said.

A. When I came in the factory at October 23rd, this was on a Friday and Martin Zell was on the cutting machine, he was cutting. So I came in the factory and I have seen Maurie Fellman there and I talked to Maurie Fellman. It was a week before the October 23 Mr. Jack Lewis told me to quit my job at Arcraft Shoe Company. He said they want me to work the following week and so I did. I quit my job at Arcraft Company.

Trial Examiner Hemingway: As of what day?

The Witness: As a week ago of October 23.

Trial Examiner Hemingway: October 16th?

The Witness: That's right, October 16th.

Trial Examiner Hemingway: Was it before the 16th that you talked to Mr. Lewis?

The Witness: That's right, it was a couple days before the 16th.

Q. (By Mr. Smith): Go ahead and explain what was said on the 23rd?

A. I quit my job and came in the 23rd of October, to the Trina Shoe Company, and I have seen another cutter standing on my machine and working. So I came in and talked to Maurie [957] Fell-

(Testimony of Eugene Piasek.)

man and said, "Listen, Maurie, Jack Lewis told me to quit my job and today I come over and he hired another cutter."

Maurie said, "To my knowledge, I know Jack Lewis didn't hire him as a cutter. He hired him as a supervisor."

But, he said, "Go in and talk to Jack.

I went in the office and talked to Jack Lewis. I said, "Jack, you told me to quit my job and I quit my job and now you hire another cutter," and I said, "He is working on my machine."

So Jack Lewis said, "I didn't hire him as a cutter. I just hired him as a supervisor. He is not a cutter."

When I talked with him, then, he said I should wait in the office for a few minutes and he will go and talk with somebody. In the meantime, Albert Lewis came into the office and he said to me, "You see, Gene, my father didn't want to take you back but I made him take you back."

Trial Examiner Hemingway: What date was this now?

The Witness: October 23rd on a Friday.

Trial Examiner Hemingway: And the conversation with Mr. Fellman and Mr. Jack Lewis that you related were also on the 23rd?

The Witness: That's right, and, "I made him take you back," he said. And in the meantime Jack Lewis came back in the office and he said, "O.K., Gene, call me tomorrow on Saturday and I will tell you when you have to come in." [958]

(Testimony of Eugene Piasek.)

I called him on Saturday morning and he told me that it would be O.K. for me to come in Monday morning to start to work and so I did.

Q. (By Mr. Smith): And for what period of continuous days did you start work that Monday, October the 26th?

A. I worked from October 26th the whole week.

Q. Was that a five-day week?

A. Five-day week. And I started on the next Monday and worked until Wednesday evening.

Q. And were you cutting through that period?

A. That's right, I was cutting. [959]

* * *

Q. (By Mr. Smith): Did you work any at all at the plant after that day, November the 5th?

A. No, I did not. [960]

Q. I call your attention to the following week which begins November 9th and I will ask you first whether you were present in the hearing which was being conducted in this room any days of that week?

A. Yes, I have been.

Q. What days did you so attend the hearing?

A. On Tuesday, Wednesday was a holiday, I was on Thursday and Friday.

Q. So you were here the three days, Tuesday, Thursday and Friday?

A. That's right.

Q. And were you here through the full course of the hearing on those days?

A. Yes, I was.

Q. Did you have any conversation with Mr. Jack Lewis during this week, that is the week of November 9th?

(Testimony of Eugene Piasek.)

A. Yes, on Wednesday when it was a holiday I went down to the shop, to the factory. Martin Zell was cutting as usual and I said, "Hi" to the boys and then Jack Lewis called me into the office. He said, "Gene, why do you have to testify against me?"

I said, "Listen, Jack, you do such unfair labor practice over here," I said, "everybody wants to testify against you. This is the truth."

I said, "You told me to quit a job. I am a [961] cutter, then you hired Martin Zell and put him on the cutting machine and you dismissed me," I said to him, "which it isn't fair."

He said, "Why didn't you tell me?"

I said, "You're the boss, I am just the employee. I can't tell you what to do."

So he said, "I will fire him the end of this week."

Q. Him, referring to whom?

A. To Martin Zell.

Q. Did you have any other conversation with Mr. Jack Lewis this week?

A. Yes, on Friday morning when we came over to here to the hearing room, Jack Lewis asked me if I would be able to start cutting on Monday. I said if I would be called to the hearing today I will be able to start working on Monday. If not, I will start working on Tuesday.

Q. Was that the full conversation that occurred at that time? A. Yes.

Trial Examiner Hemingway: What day was that now?

(Testimony of Eugene Piasek.)

The Witness: That was on a Friday, November 13th.

Trial Examiner Hemingway: November 13th?

The Witness: That's right.

Q. (By Mr. Smith): Calling your attention to the fact you did testify on Monday, the first day of the next week, I will ask you what was the date of your next trip to the factory, if any? [962]

A. My next trip was on Tuesday morning like I told Jack Lewis. I came over on Tuesday morning to the factory and as I walked in from the office to the packing room, Joe Levitan had seen me come in so he came in running, he wouldn't let me go into the factory. He said, "Listen, Gene, we don't need you now. If we need a cutter we will call you."

* * *

Q. What was your next trip, if any, to the factory?

A. My next trip was a week later. It was on Monday morning. I came in and I have seen Jack Rosenthall working, cutting. I went over and we talked and it didn't bother me that he was cutting there but it bothered me one thing, if they wanted to fire me why didn't they tell me a week ago. [963]

* * *

Q. What did you do next?

A. My next step was I came over here to the Labor Board.

Q. And on this day did you have any conversation with Mr. Fellman in this room?

(Testimony of Eugene Piasek.)

A. When I came over here it was about 2:30. It was a recess at this time here, or 2:30 or 3:00 o'clock in the afternoon, and Mr. Fellman was here. Everybody was out and I said to Maurie, "Listen, Maurie, how come you fired me?"

He said, "Mr. Perkins called me over. It was Friday or Saturday, he told me to send a telegram to Jack Rosenthal."

This was the conversation. [964]

* * *

JACK LEWIS

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

* * *

By Mr. Smith:

Q. I will ask you if in that telephone conversation with Mr. Greenberg you made to him a statement approximately as follows, "Maybe we will get together again in a week or two and you can go to work for me." [997]

* * *

The Witness: In essence it might have been but in actual conversation did not. He just wanted to know what was doing in the plant and if we were busy and so on and so forth and did we straighten it out as far as the union was concerned and I told him that we were in the midst of the hearing right now and I couldn't very well tell him one way or

(Testimony of Jack Lewis.)

the other and that is all. That was the entire conversation. That is my recollection.

* * *

Q. (By Mr. Smith): Has the arrangement between California and Trina been severed as of this date? A. Yes.

Q. Was that severance about the first of January of this year? A. Yes, that's right.

Q. Is there at present any financial obligation from Trina [998] to California, money still owed California? A. That's right.

* * *

Trial Examiner Hemingway: I would like to ask on what account is that money owed?

The Witness: On what account?

Trial Examiner Hemingway: For what purpose?

The Witness: For merchandise billed to the Trina Shoe Company. [999]

* * *

RICHARD A. PERKINS

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows: [1010]

* * *

The Witness: I testified to that. Yes, we will stipulate to it if you like.

Trial Examiner Hemingway: Respondents' Exhibit 19 is received in evidence.

(Testimony of Richard A. Perkins.)

(The document heretofore marked Respondents' Exhibit No. 19 for identification was received in evidence.)

Trial Examiner Hemingway: Is there a copy of that available that you can supply, Mr. Smith?

Mr. Smith: Yes.

The Witness: * * * Before Piasek was replaced with Rosenthal, I was aware of the contents of the complaint which, to my present recollection, contained the standard language that the respondents had discriminated and were still discriminating against Rosenthal within the meaning of the Act and thereby committing an unfair labor practice. Now, the record, of course, shows what Rosenthal's testimony was regarding the [1013] offer of reinstatement having been made him. There was testimony about his going back a few days later and not being able to get employment and, of course, I was here and I heard that. There was no indication at the time either in or out of the hearing to me to the effect that the Government was not claiming reinstatement for Rosenthal and to my consideration of the matter I had regard to an incident that occurred in another case because that has a bearing on the advice which I gave. [1014]

* * *

We had a meeting in the premises on Main Street in Venice on Sunday, I believe, it was a Sunday before Rosenthal was called back. [1015]

* * *

(Testimony of Richard A. Perkins.)

The Witness: That was around the 20th of November, I think. I think it was a Sunday, I know it was on a week end because that is the only time I can get out of that plant.

The question of putting a cutter to work came up. I don't recall exactly how but I think I probably asked in view of the testimony going on here whether there was any work for a cutter and, if so, what kind of material they were running. They said, Mr. Fellman said, as I recall that, and possibly Mr. Lewis, also, that the Trina plant was running some plastic, was cutting plastic and I asked whether there was any leather to be cut in the immediate future. The answer I got was that there probably would not be.

I recalled that the Government had tried to make out here that Rosenthal was as good a cutter as Piasek or, rather, that there wasn't enough leather cutting to amount to anything and I considered whether my professional duty to the respondents might not be best served by advising them that Trina should take Rosenthal back. [1016]

I asked if anyone knew how to get in touch with Rosenthal and somebody had a record somewhere of a phone number as to how to reach him. I said to Mr. Fellman I would advise that you recall Rosenthal and if there was only work for one cutter, let Piasek go if necessary. [1017]

* * *

JACK LEWIS

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows: [1046]

* * *

Q. (By Trial Examiner Hemingway): Mr. Lewis, referring to the testimony at the hearing of November, I believe it was where the incident was brought up about your parking your car across the street from the meeting place of the union.

A. Yes. [1050]

* * *

Q. Which one of you spoke first when he came by you?

A. Oh, he just walked over, walked out from the car and along the sidewalk and stopped right off and asked me what I am doing. I said this man was from Passaic, New Jersey, and was looking around, he was a shoe man looking the territory over and just sitting and talking. The man was waiting for a bus. And I said what are you doing here and he said well I am [1052] going to a meeting across the street.

Q. Did Mr. Piasek have to lean over to speak to you?

A. No, he just leaned on the car door when the car door was open. He was standing there and I was sitting at that time in the car. We had, oh, maybe a five, six minute conversation, just general conversation, nothing of any importance. I mean, as

(Testimony of Jack Lewis.)

far as the work or the union or anything like that, just general conversation.

* * *

Trial Examiner Hemingway: Has any arrangement been made with Mr. Fellman as to the manner in which the Trina deficit will be cleared up?

A. Well, the understanding is this here, whatever money, I haven't got the exact money yet because the accountant is figuring out the closing of the books of December 31st and he will be around sometime this week and figure out exactly and whatever, the understanding is such that we still hold the chattel mortgage on the equipment of Trina Shoe Company and continue to hold that chattel mortgage on it until all the money is paid. [1053]

* * *

Cross-Examination

By Mr. Smith:

Q. The lease was canceled without any obligation on either side?

A. You mean as far as the lease is concerned?

Q. Yes. A. The lease, yes.

Q. So the only remnant that remains of the organization is the chattel mortgage and the debt in an unspecified amount?

A. At the present time unspecified, it is specified as far as the books are concerned. The only thing that has to be computed to determine a total.

Q. Only the debt and the chattel mortgage remain in any relationship between California and Trina?

(Testimony of Jack Lewis.)

A. What do you mean, I don't understand.

Q. Is your working arrangement between the two companies [1054] otherwise at an end and except for the debt and chattel mortgage?

A. That is all.

Mr. Smith: No further questions.

Q. (By Trial Examiner Hemingway): Do I understand California is now operating a plant on their own account?

A. It is not operating.

Q. It is closed down?

A. As far as work is concerned.

Q. Is that a temporary matter?

A. Well, it might be called temporary or it might be called—until we make some other arrangements.

Q. What is the reason for being shut down?

A. Quite a number of reasons, business conditions, we are negotiating, trying to negotiate with somebody else to see if they can run the plant for us under a satisfactory arrangement, and business in general and that is just why we are standing still with nobody working.

Q. If business conditions improve, are you going to wait until you get somebody else to run the plant?

A. Yes, if we get hold of somebody satisfactory, somebody worthwhile, if we can come to decent arrangements, we will make an arrangement on the same order. If not, we might consider to run it ourselves again. Our mind isn't exactly made up which way the factory is going to operate. [1055]

HERMAN GREENBERG

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Smith:

Q. Mr. Greenberg, have you ever worked for California Footwear at their downtown Los Angeles address? A. I did.

Q. In what period?

A. I worked until '53. I worked about close to three years.

Q. Ending about what month and year?

A. I think January, January of 1953.

Q. What was your work during that period of time? A. Cutting. [1062]

Q. Did you do any other work in that time?

A. No.

Q. Did you work steadily during that three year period? A. Mostly.

Q. Were you the only cutter in that period?

A. In the busy time we used to get help out, most of the times I used to work myself.

Q. Did you have any telephone conversation with Mr. Jack Lewis in November of 1953?

A. Yes, November 14th at 10:00 o'clock I had a telephone call from Jack Lewis.

Q. What day of the week was that?

A. On a Saturday.

(Testimony of Herman Greenberg.)

Q. And did you make the call or did he?

A. He called me.

Trial Examiner Hemingway: Would you read that question, please?

(Question read.)

Q. (By Mr. Smith): Did he call you at your home or at some place else? A. Home.

Q. Tell us what was said by you and he.

A. He asked me if I was working and I said I am working and then I asked him if he straightened out with the union and he said we expect to get straightened out the beginning of next [1063] week so I may return and we may get together again.

Trial Examiner Hemingway: Will you read that, please?

(Question read.)

Trial Examiner Hemingway: Is that what you said?

The Witness: No, what he said.

Q. (By Mr. Smith): Was anything else said?

A. Then I said that I expect to hear from him.

Q. Was that all of the conversation?

A. Yes. [1064]

* * *

Received January 14, 1954.

GENERAL COUNSEL'S EXHIBIT No. 3

August, 1953, Advances and Expenditures

Trina Shoe Co.

Advances Received from California Footwear Co.

August 5	\$1000
August 12	\$1600
August 18	\$1000
August 26	\$1000

Total	\$4600
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Expenditures*

August 8 (Payroll)	\$1042.28
August 10 (Taxes)	364.88
August 14 (Payroll)	967.41
August 21 (Payroll)	646.64
August 26 (WT and FOAB)	767.68
August 26 (Welfare)	79.50
August 28 (Payroll)	533.90

Total	\$4609.62
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Bank Balance at End of August.....\$ 96.60

*Four miscellaneous items totaling \$207.33 are not included in breakdown but are included in total.

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 4

Agreement to Buy and Sell Footwear

This agreement, made at Los Angeles, California, January 2, 1953, by and between Trina Shoe Company, a California corporation, hereinafter called Seller, and California Footwear Company, a co-partnership, hereinafter called Buyer, witnesseth:

1. Seller agrees to sell to Buyer and Buyer agrees to buy from Seller all of the shoes, slippers, and other footwear required by Buyer in its merchandising operations during the calendar year 1953.

2. Seller agrees to sell Buyer shoes, slippers, and other footwear according to Buyer's specifications, which shoes, slippers, and other footwear shall conform to production samples as to material, quality, and workmanship, and shall be subject to rejection for defective material, quality, or workmanship by Buyer or any of its customers. Seller agrees to replace such rejected shoes, slippers, and other footwear at no additional cost. Such rejection shall be limited to the period of 60 days from delivery to Buyer or to any of its customers, whichever receives the original delivery from Seller. Buyer may direct Seller to make shipments to any of Buyer's customers or to itself, and Seller agrees to make shipments in accordance with such instructions. Buyer shall have the right to inspect both finished articles and work in process on Seller's premises.

3. The price of each style of shoe, slipper, or other footwear to be sold by Seller to Buyer hereunder shall be agreed upon between them in writing before Seller enters upon production of said style for sale to Buyer. In the event of the failure of the parties hereto to agree upon such price within three days after request by either party the price shall be determined by arbitration under the rules of the American Arbitration Association then obtaining. Buyer shall furnish Seller technical advice and assistance and a reasonable allowance therefor shall be made in fixing prices. In the event that Buyer furnishes Seller the use of Buyer's machinery or equipment a reasonable allowance shall be made for the value of its use.

4. Buyer shall pay Seller for each shipment of shoes, slippers, or other footwear within 30 days after delivery, provided, however, that Buyer may set off the amount of any invoice against any amount owing Buyer by Seller.

5. It is specifically understood and agreed that Seller is acting hereunder as a vendor and that no relationship of principal and agent, master and servant, manufacturer and sub-manufacturer, jobber and contractor, partnership, or joint venture is intended or shall exist between the parties hereto.

6. This agreement shall not be assignable by Seller without Buyer's consent. Buyer may assign without Seller's consent only to an individual proprietorship, partnership, or corporation which

takes over the merchandising operations of Buyer as a going concern.

TRINA SHOE COMPANY,
A Corporation;

By /s/ MAURICE FELLMAN,
President.

CALIFORNIA FOOTWEAR
COMPANY,
A Co-Partnership;

By /s/ JACK LEWIS,
Partner.

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 5

Sublease

This agreement, made and entered into this 1st day of January, 1953, by and between California Footwear Company, a co-partnership, Lessor, and Trina Shoe Company, a corporation, Lessee, witnesseth:

1. Lessor lets to Lessee for the term of 5 years beginning January 1, 1953, the following described premises, the same being a portion of the premises which Lessor holds under a lease from Kate Salisbury. (See attachment.)

2. Lessee agrees to pay Lessor as rent for the demised premises for the term hereof the sum of \$17,400.00, payable in monthly instalments of

\$275.00 each on the first day of each month beginning January 1, 1953, for the first two years, and \$300.00 monthly thereafter.

3. Lessee agrees to use said demised premises only for the purpose of conducting footwear manufacturing operations, and agrees not to commit or suffer to be committed any violation of any zoning or other applicable laws, ordinances, or regulations in the use or maintenance of said demised premises. Lessee shall not commit or suffer to be committed any waste upon the demised premises, or any public or private nuisance, or other act or thing which may disturb the quiet enjoyment of any other occupant of the building in which the demised premises are located. Lessee shall not make, or suffer to be made, any alterations of the demised premises or any part thereof without the written consent of Lessor first had and obtained, and any additions to, or alterations of, the premises, except movable furniture and trade fixtures, shall belong to Lessor.

4. Lessee shall not use or permit said demised premises or any part thereof to be used for any purpose other than the aforesaid purpose for which said premises are hereby leased; and no use shall be made or permitted to be made of said premises, nor acts done, which will increase the existing rate of insurance upon the building in which said premises are located, or cause a cancellation of any insurance policy covering said building, or any part thereof, nor shall Lessee sell or permit to be kept, used, or sold, in or about said premises, any article

which may be prohibited by the standard form of fire insurance policies. Lessee shall, at its sole cost and expense, comply with any and all requirements, pertaining to said premises, of any insurance organization or company, necessary for the maintenance of reasonable fire and public liability insurance, covering said building.

5. Lessee shall, at its sole cost, keep and maintain said demised premises and every part thereof (except exterior walls and roofs, which Lessor agrees to repair), in good and sanitary order, condition, and repair, and replace broken glazing, hereby waiving all right to make repairs at the expense of Lessor as provided in Section 1942 of the Civil Code of the State of California, and all rights provided for by Section 1941 of said Civil Code. By entry hereunder, Lessee accepts the premises as being in good and sanitary order, condition, and repair and agrees on the last day of said term, or sooner termination of this lease, to render said demised premises unto Lessor in the same condition as received, reasonable use and wear thereof and damage by fire, Act of God, or by the elements excepted, and to remove all of Lessee's signs from said premises.

6. Lessee acknowledges that it is fully familiar with all of the terms and provisions of the underlying lease from Kate Salisbury to Lessor and agrees that Lessee will not commit or suffer to be committed any act or omission in relation to the premises demised to Lessee which would constitute

a breach of condition or covenant or give rise to a right of forfeiture jeopardizing Lessor's tenure under said underlying lease.

7. In addition to the rent hereinbefore reserved, Lessee shall pay before delinquency all charges for water, gas, heat, electricity, power, and all other services which may be used in or upon the demised premises during the term of this lease, except that where Lessee uses services in common with Lessor, which services are not separately assessed or metered, Lessee shall pay its proportionate share thereof, such share to be determined by mutual agreement within three (3) days after notice if possible, otherwise to be determined by arbitration under the rules of the American Arbitration Association then obtaining.

8. Lessee shall not vacate or abandon the premises at any time during the term; and if Lessee shall abandon, vacate, or surrender said premises, or be dispossessed by process of law, or otherwise, any personal property belonging to Lessee and left on the premises shall be deemed to be abandoned, at the option of Lessor, except such property as may be mortgaged to Lessor.

9. Lessee, as a material part of the consideration to be rendered to the Lessor under this lease, hereby waives all claims against Lessor for damages to goods, wares, and merchandise, in, upon, or about said premises, from any cause arising at any time, and Lessee shall hold Lessor exempt and

harmless for and on account of any damage or injury to any person, or to the goods, wares, and merchandise of any person, arising from the use of the premises by Lessee, or arising from the failure of Lessee to keep the premises in good condition and repair, as herein provided.

This lease is made upon the express condition that Lessor is to be free from all liability and claim for damages by reason of any injury to any person or persons, or any property of any kind whatsoever and to whomsoever belonging, including Lessee's, from any cause whatsoever while in, upon, or in any way connected with the said demised premises during the term of this lease or any extension hereof or any occupancy hereunder, Lessee hereby covenanting and agreeing to indemnify and save harmless Lessor from all liability, loss, cost, and obligations on account of or arising out of any such injuries or losses however occurring.

10. Lessee shall permit Lessor and its agents to enter into and upon said premises at all reasonable times for the purpose of inspecting the same, for the purpose of maintaining the building in which said premises are located, for the purpose of making repairs, alterations, or additions to any other portion of the building, or for the purpose of removing from said demised premises any personal property of Lessor. The reservation of the right of Lessor to enter said demised premises for the aforesaid purposes shall not imply any obligation on its

part to do so unless expressly so required by some other provision of this lease.

11. Lessee shall not assign this lease, or any interest therein, and shall not sublet the said premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person (the agents and servants of Lessee excepted) to occupy or use the said premises, or any portion thereof, without the written consent of Lessor first had and obtained, and a consent to one assignment, subletting, occupation or use by any other person shall not be deemed a consent to any subsequent assignment, subletting, occupation, or use by another person. Any such assignment or subletting without such consent shall be void, and shall, at the option of Lessor, terminate this lease. This lease shall not, nor shall any interest therein, be assignable, as to the interest of Lessee, by operation of law, without the written consent of Lessor.

12. In the event of any breach of this lease by Lessee, then Lessor besides other rights or remedies it may have, shall have the immediate right of re-entry and may remove all persons and property from the premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of, Lessee. Should Lessor elect to re-enter, as herein provided or should it take possession pursuant to legal proceedings or pursuant to any notice provided by law, it may either terminate this lease or it may from time to time, without terminating this lease, relet

said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor in its sole discretion may deem advisable, with the right to make alterations and repairs to said premises. Rentals received by Lessor from such reletting shall be applied: first, to the payment of any indebtedness, other than rent, due hereunder by Lessee to Lessor; second, to the payment of rent due and unpaid hereunder; third, the payment of any cost of such reletting; fourth, to the payment of the cost of any alterations and repairs to the premises; and the residue, if any, shall be held by Lessor and applied in payment of future rent as the same may become due and payable hereunder or in payment of any other obligation of Lessee to Lessor. Should such rentals received from such reletting during any month be less than that agreed to be paid during that month by Lessee hereunder, then Lessee shall pay such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of said premises by Lessor shall be construed as an election on its part to terminate this lease unless a written notice of such termination be given to Lessee or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate this lease for such previous breach. Should Lessor at any time terminate this lease for any breach, in addition to any other remedy it may have, it may recover from Lessee all

damages Lessor may incur by reason of such breach, including the cost of recovering the premises, and including the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this lease for the remainder of the stated term over the then reasonable rental value of the premises for the remainder of the stated term.

13. In case suit is brought by Lessor to enforce any of the provisions of this lease or to recover rent or the possession of said premises, or in case Lessor is required to defend this lease in any action brought against Lessor, Lessee shall pay to Lessor a reasonable attorney's fee which shall be fixed by the court.

14. The waiver by Lessor of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition or any subsequent breach of the same of any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Lessor shall not be deemed to be a waiver of any preceding breach by Lessee of any term, covenant, or condition of this lease, other than the failure of the Lessee to pay the particular rental so accepted, regardless of Lessor's knowledge of such preceding breach at the time of acceptance of such rent.

15. Any holding over after the expiration of the said term, with the consent of Lessor, shall be con-

strued to be a tenancy from month to month, at a rental of \$300.00 a month, and shall otherwise be on the terms and conditions herein specified, so far as applicable.

In Witness Whereof, Lessor and Lessee have executed these presents, the day and year first above written.

CALIFORNIA FOOTWEAR
COMPANY,

A Co-Partnership,

By /s/ JACK LEWIS,
Partner (Lessor.)

TRINA SHOE COMPANY,
A Corporation;

By /s/ MAURICE FELLMAN,
President (Lessee.)

(Attachment to sublease of premises at 222
South Main Street, Venice.)

The premises covered by this sublease consist of the business building located at 222 South Main Street, Venice, in the City of Los Angeles, County of Los Angeles, State of California, Excepting the front store room, the rear office room, and the front office room. Lessee shall have the joint use of the front office room with Lessor and shall have the right to use the pedestrian and vehicular entrances on Main Street for its business operations.

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 6

Promissory Note

Venice, California.

March 21st, 1953.

On Demand we promise to pay to the order of California Footwear Company at Union Bank & Trust Co., Los Angeles, California, for value received, the sum of Three Thousand Five Hundred Dollars (\$3,500.00) with interest at six per cent (6%) per annum from date until paid, interest payable annually. In the event of default of payment of principal or interest hereunder we promise to pay reasonable attorney fees to the holder of this promissory note.

TRINA SHOE COMPANY,
A Corporation;

By /s/ MAURICE FELLMAN,
Its President,

/s/ MAURICE FELLMAN.

This Promissory Note Is Secured
by Chattel Mortgage

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 7

This Instrument Is a
Mortgage of Chattels

This mortgage, made the 21st day of March, 1953, by Trina Shoe Company, a California corporation, of the County of Orange, State of California, Mortgagor, to California Footwear Company, a co-partnership, Mortgagee,

Witnesseth:

That the Mortgagor to the Mortgagee all of the following personal property, situated at 222 Main Street, Venice, in the County of Los Angeles, State of California, and described as follows, viz.:

Office Equipment

- 1—Victor Adding Machine, #510060.
- 2—4 Dr. Steel File Cabinets.
- 3—Misc. Card File Cabinets.
- 1—Royal Typewriter, #Z1110.
- 1—Paymaster Check Protector. Desk, chairs, etc.
Safe (Hall Safe Company).

Machinery & Equipment

- 1—Schwab Clicker, Serial #6689.
- 1—Reece Clicker, #717.
- 1—Western S.P. Model Strap Perforator #193.
- 1—Western S.P. Model Strap Perforator Stand &
Motor #120.

- 1—Bostiche Stand and Motor #135.
- 1—Booth Lining Trimmer #33.
- 1—Schaefer Gluing Machine #1385.
- 1—United Cement Machine, Model C #1781.
- 1—Allied Cement Machine.
- 1—Brauner 2 Jack Sole Press.
- 1—Ingersoll-Rand Compressor $\frac{1}{2}$ H.P.
- 1—Wilson Speed Print #4874.
- 1—Schwab Sole Ruffer #534.
- 1—Auto-Soler #39205.
- 1—W. J. Young Sole Splitter.
- 1—Press (Home made).
- 1—Heater.
- 5—Fluorescent Lights.
Apex Channel Machine.

Sewing Machines

- 1—Singer Stand, clutch and motor 112W115
#W613781.
- 1—Singer Buckle Sewer 58-11—#7128731.
- 3—Singer 110W125 (W899711-W1032362-
W852265).
- 1—Singer Head only Zig Zag—#32-1.
- 1—Singer Head only 31-20 N349543.
- 1—Singer H. Post 51W28.
- 1—Peerless Folder #603.
- 1—United Model 7 Sciver #9524.
- 2—Puritan Machines.

Equipment

Tables, cutting tables, Miscellaneous Motors and small hand tools around shop.

As Security For:

The repayment of Three Thousand Five Hundred Dollars (\$3,500.00) with interest thereon, according to the terms of a promissory note of even date herewith, executed by Mortgagor and Maurice Fellman, payable to the order of Mortgagee, and any and all renewals thereof, and any and all renewals of other indebtedness or obligations secured hereby, and

The repayment of any and all sums and amounts that may be advanced or expenditures that may be made by Mortgagee or the holder or owner of any indebtedness or obligation secured hereby, subsequent to the date of execution of this Mortgage for the maintenance or preservation of the mortgaged property or any part thereof, or that may be advanced or expended by the Mortgagee or the holder or owner of any indebtedness or obligation secured hereby pursuant to any of the provisions of this Mortgage subsequent to its execution, together with interest at 6% per annum on all such advances or expenditures, and

The repayment of any and all sums that may be advanced by Mortgagee or the holder or owner of any indebtedness or obligation secured hereby, and

The repayment of any and all indebtedness and obligations that may be incurred, subsequent to

the execution of this Mortgage, by Mortgagor to Mortgagee or to the holder or owner of any indebtedness or obligation secured hereby, together with interest thereon.

The maximum amount the repayment of which is secured by this Mortgage is Twenty-five Thousand Dollars (\$25,000.00), but the creation of debts in such amount or any part thereof is optional with the Mortgagee, and said maximum amount of Twenty-five Thousand Dollars (\$25,000.00) shall be considered only as the limit of the sums, expenditures, indebtedness, and obligations secured hereby at any one time, and shall not include such as may have existed and been repaid or discharged hereunder.

Mortgagor agrees to do and perform each of the following:

To do all acts which may be necessary to maintain, preserve and protect said mortgaged property; to keep said mortgaged property in good condition and repair; not to commit or permit any waste of said mortgaged property, nor to commit or permit any act with regard to said property in violation of law.

To pay, at least ten (10) days before delinquency, all taxes and assessments now or hereafter imposed on or affecting said mortgaged property, and to pay, when due, with interest thereon, all encumbrances, charges, or liens on said mortgaged property, or any part thereof, which appear to be prior or superior hereto.

To insure said mortgaged property and to keep all said property insured against fire and any other hazards designated by Mortgagee, which insurance protection shall be equal to the full insurable value of said property or to the amount of Mortgagor's unpaid indebtedness secured hereby, whichever is smaller. All policies of such insurance shall: (1) be in insurance carriers approved by Mortgagee, (2) at request of Mortgagee be delivered to it, and (3) provide that any loss thereunder be payable to Mortgagee. The amount collected under any fire or other insurance policy may be applied by Mortgagee upon any indebtedness or other obligations secured hereby or to the restoration of any or all of said mortgaged property in such manner as Mortgagee may determine, or at option of Mortgagee the entire amount so collected or any part thereof may be released to Mortgagor. Such application or use shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

To keep said mortgaged property separate and always capable of identification; not to sell, contract to sell, lease, encumber, dispose of or permit the consumption of all or any part of said mortgaged property, and not to remove all or any part of said mortgaged property from the premises on which it is now located or on which it may hereafter be located, without the written consent of Mortgagee, provided, however, that Mortgagee hereby consents to the use by Mortgagor of materials and supplies in the course of its manufacturing operations and

to the sale and delivery of finished footwear to its customers in the usual course of business, provided further, however, that the accounts receivable arising from such sales shall be assigned to Mortgagee.

To appear in and defend any and all actions or proceedings purporting to affect the security interest of Mortgagee in or title to all or any part of said mortgaged property, to pay all costs and expenses, including cost of evidence of title and attorneys' fees, in any such action or proceeding in which Mortgagee might appear, and Mortgagor hereby warrants that it is the sole owner and in possession of all said mortgaged property and that said mortgaged property is free and clear of all liens, encumbrances and adverse claims with the exception of the lien of this Chattel Mortgage.

To give to Mortgagee further security or to make payments on account to Mortgagee in the event there shall hereafter be a decrease in the value of said mortgaged property. Such further security or payments shall be in an amount or to the extent sufficient to offset said decrease in value.

Mortgagor further agrees that a failure on the part of Mortgagor to do or perform any of the foregoing shall constitute a default under this Chattel Mortgage.

Mortgagor further agrees:

1. If Mortgagor fails to make any payment or do any act as herein agreed, then Mortgagee, but without obligation so to do and without notice to

or demand upon Mortgagor, may make such payments and do such acts as Mortgagee may deem necessary to protect its security interest in said mortgaged property, Mortgagee being hereby authorized to take possession of said mortgaged property or any part thereof and to pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of Mortgagee appears to be prior or superior to the lien of this Chattel Mortgage, and in exercising any such powers and authority to pay necessary expenses, employ counsel and pay them reasonable fees. Mortgagee's determination as to whether Mortgagor has failed to make any payment or do any act where herein required shall be final and conclusive. Mortgagor hereby agrees to repay immediately, and without demand, all sums so expended by Mortgagee pursuant to the provisions of this paragraph, with interest from date of expenditure at the rate of 6% per annum.

2. If Mortgagor shall default in the payment of any of the indebtedness, obligations, or liabilities secured hereby, including interest, or shall default in the performance of any other agreement herein contained, then Mortgagee at its option, without demand upon or notice to Mortgagor, may and it is hereby empowered to do the following:

(a) Declare all indebtedness, obligations and liabilities secured hereby to be immediately due and payable; or

(b) Proceed to foreclose this Mortgage according to law, and in any action of foreclosure (1)

there shall be due from Mortgagor to the plaintiff in such action, immediately upon the commencement thereof, an attorney's fee of One Hundred Fifty Dollars (\$150.00), and, if the action goes to judgment, a further attorney's fee equal to 10 per cent (10%) of the amount found due, which sums Mortgagor agrees to pay and which shall be included in the judgment in such action, and (2) plaintiff in such action shall be entitled to the appointment of a receiver, without notice, to take possession of all or any part of said mortgaged property and to exercise such powers as the Court shall confer upon him; or

(c) With or without foreclosure action, enter upon the premises where said mortgaged property or any part thereof may be and take possession thereof and remove or sell and dispose of said mortgaged property or any part thereof at public or private sale.

No power or remedy herein conferred upon the Mortgagee is exclusive of or shall prejudice any other power or remedy of the Mortgagee, and each such power and remedy may be exercised from time to time and as often as is necessary.

3. The sale described in Paragraph 2(c) of this Chattel Mortgage may be held by Mortgagee without any previous demand of performance or notice to Mortgagor of any such sale, and notice of sale, demand of performance, and all other notices and demands are hereby expressly waived by Mortgagor. Said mortgaged property, or any part thereof, may

be sold in one or more lots, and at one or more sales, which may be held on different days and which need not be held within view of the property being sold. Mortgagee may postpone the sale of all or any portion of said mortgaged property from time to time by public announcement at the time and place of sale if sold at public auction.

Mortgagee shall deduct and retain from the proceeds of such sale or sales all reasonable costs and expenses paid or incurred in the taking, removal and sale of said property, including any reasonable attorney's fees incurred or paid by Mortgagee; the balance of the proceeds shall be applied by Mortgagee upon the indebtedness, obligations, and liabilities secured hereby, in such order and manner as the Mortgagee may determine, and the surplus, if any, shall be paid to the Mortgagor or to the person or persons lawfully entitled to receive the same.

At any sale or sales made under this Mortgage or authorized herein, or at any sale or sales made upon foreclosure of this Mortgage, Mortgagee (or its representative) may bid for and purchase any property being sold, and, in the event of such purchase, shall hold such property thereafter discharged of all rights of redemption.

4. Mortgagor hereby assigns to Mortgagee all sums now or hereafter payable to Mortgagee as the proceeds of sale of said mortgaged property, or any part thereof, and any and all sums now or hereafter payable to Mortgagor under the terms of any

agreement for the sale or marketing of said mortgaged property, or any part thereof, to anyone other than Mortgagee; provided, however, that nothing in this paragraph contained shall be construed to waive or in any way affect the lien of this Mortgage or the limitations, hereinabove expressed, upon the Mortgagor's right to deal with said mortgaged property without Mortgagee's written consent.

5. By accepting payment of any sum secured hereby after its due date, Mortgagee does not waive or in any manner affect its right to require prompt payment when due of all other sums so secured and to declare a default for failure of Mortgagor so to pay. The waiver by Mortgagee of any default of Mortgagor under this Chattel Mortgage shall not be or be deemed to be a waiver of any other or similar default subsequently occurring.

6. If Mortgagee shall find that title to all or any of said mortgaged property is not as represented herein or if any change occurs in the title to all or any part of said mortgaged property without Mortgagee's written consent as herein provided, Mortgagee may, without any notice or demand at its discretion, from time to time, and without in any way impairing or releasing the obligations of Mortgagor hereunder do any of the following:

(a) Take, exchange, or release security for any of the obligations now or hereafter secured hereby;

(b) Extend the time for payment of said obligation;

(c) Otherwise change the terms of said obligations;

(d) Declare the whole of the balance of principal of said indebtedness secured hereby and the accrued interest to be due and payable immediately.

7. Mortgagee shall be entitled to enforce any indebtedness, obligation or liability secured hereby and to exercise all rights and powers hereby conferred, although some or all of the indebtedness, obligations and liabilities secured hereby are now or shall hereafter be otherwise secured. Mortgagee's acceptance of this Mortgage shall not affect or prejudice Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee.

8. The provisions of this Chattel Mortgage are hereby made applicable to and shall inure to the benefit of and bind all parties hereto and their heirs, legatees, devisees, administrators, executors, successors, and assigns (including a pledge of any indebtedness secured hereby.)

In Witness Whereof, Mortgagor has executed these presents the day and year first above written.

[Seal]

TRINA SHOE COMPANY,
A Corporation;

By /s/ MAURICE FELLMAN,
Its President.

Attest:

/s/ RUTH FELLMAN,
Secretary.

State of California,
County of Los Angeles—ss.

On March 21, 1953, before me, Ann Flinkman, a Notary Public in and for said County and State, personally appeared Maurice Fellman, known to me to be the President of Trina Shoe Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

[Seal] /s/ ANN FLINKMAN,
Notary Public in and for
Said County and State.

My commission expires April 29, 1953.

Recorded at request of Richard A. Perkins
March 25, 1953, Orange County, California.

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 10

(Copy)

Milton S. Tyre

Lawyer

Milton S. Tyre

Richard J. Kamins

650 South Grand Avenue

Los Angeles 17

TRinity 2181

February 19, 1953.

California Footwear Company,
253 South Los Angeles,
Los Angeles, California.

Trina Shoe Company,
222 Main Street,
Venice, California.

Gentlemen:

I represent United Shoe Workers of America,
Local 122.

The purpose of this letter is to confirm the statement of the Union's position heretofore made to you on several previous occasions.

It is the Union's position that the firm known as Trina Shoe Company in truth and in fact is actually California Footwear Company. It is the Union's position that the contract made between California Footwear Company and the Union last

year continues to be fully binding upon the firm known as Trina Shoe Company.

If you should take the position that Trina Shoe Company is not the same firm as California Footwear Company, in any event, it is a successor to California Footwear Company. Under the provisions of Section 2 of the contract between the Union and California Footwear Company the contract is binding upon its successor. Furthermore, until the successor has expressly agreed to be bound by the contract the liability of California Footwear Company continues.

This letter shall also serve as formal notice upon you that regardless of what position is taken by the Company as to the existence of a union contract, all of the employees engaged at the old job at 253 South Los Angeles, Los Angeles, California, request employment on jobs which they are capable of performing at the first time that the job becomes available. You may reach the employees involved either by notifying the Union or notifying the employee direct.

Very truly yours,

MILTON S. TYRE.

MST:BS

c.c. United Shoe Workers of America, Local 122.

[Stamped]: Received May 21, 1953.

Received in evidence November 10, 1953.

GENERAL COUNSEL'S EXHIBIT No. 12

1953 Contract Between
United Shoe Workers of
America, Local 122, C.I.O.
and
California Footwear Company

September 27, 1952.

California Footwear Company,
253 So. Los Angeles Street,
Los Angeles 12, California.

Attention: Mr. Jack Lewis.

Gentlemen:

Any reference in the contract to the Southern California Shoe Manufacturers Association, Inc., is without any force or effect unless or until your Company becomes a member of said Association. If this is your understanding, kindly sign in the space hereinbelow provided.

Yours truly,

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122, C.I.O.,

By ERNEST TUTT,

Title: International
Representative.

Approved and accepted:

CALIFORNIA FOOTWEAR
COMPANY,

Name of Company.

By JACK LEWIS,

Title: Partner.

Los Angeles, California,

November 28, 1952.

California Footwear Company,
253 South Los Angeles Street,
Los Angeles 12, California.

Gentlemen:

This letter shall constitute an agreement between us, when executed by you in the space hereinbelow provided.

Pursuant to Section XIII, Paragraph 4, the Arbitration Panel shall consist of the following named arbitrators:

1. Benjamin Aaron.
2. Paul A. Dodd.
3. J. A. C. Grant.

Very truly yours,

UNITED SHOE WORKERS OF AMERICA,
LOCAL 122, C.I.O.,

By /s/ ERNEST TUTT,

International Representative.

Accepted and agreed:

CALIFORNIA FOOTWEAR
COMPANY,

By /s/ JACK LEWIS,
Partner.

Agreement

This agreement is made this 27th day of September, 1952, by and between California Footwear Company, a co-partnership, hereinafter referred to as the "Employer," and United Shoe Workers of America, Local 122, C. I. O., hereinafter referred to as the "Union."

Section I.

Duration

This agreement shall be effective commencing October 1, 1952, and terminating at midnight on September 30, 1953, and shall automatically renew itself on October 1 of each year for an additional year unless and until either party gives notice in writing to the other of its desire to terminate or modify it at least 60 days prior to its regular termination. In such event, the parties shall meet and determine whether the current agreement shall remain in effect until the new agreement is made. Upon failure to reach an agreement upon the current contract, the agreement shall automatically expire at midnight of the 30th day of September of that year

Section III.

Union Membership

1. The employer recognizes the Union as the sole and exclusive collective bargaining agency for all of its employees engaged in the production of shoes, but excluding executive, administrative, sales, professional, clerical, maintenance, truck driver, shipping and supervisory employees, with respect to rates of pay, wages, hours of employment, grievance for any and all individuals or group of individuals, and other conditions of employment.

2. When the employer has a job opening, he is required first to call the Union to see if there are any unemployed persons on the Union's list available for the job. The Union shall have 36 hours in which to furnish such employee or employees. Thereafter, the employer may hire the employee or employees in the open market. All employees shall apply for membership in the union no later than 30 days after their employment, and the Union agrees to accept such persons into membership upon payment of the requisite initiation fees and dues. The Union agrees to maintain a list of unemployed persons from both present and past employer members of Southern California Shoe Manufacturers Association, Inc., and the filling of new jobs shall be made from this list first in accordance with the seniority provisions of this agreement and thereafter, on the basis of the person longest laid

off being the first to be employed. The Union shall maintain another list of all other persons who wish to be placed thereon, which list shall be used after the first list has been exhausted. The Union agrees not to discriminate against any person because of his membership or non-membership in the Union in maintaining such lists.

3. All employees after thirty days from their employment shall be required as a condition of continued employment for the duration of this agreement to become and remain members of the Union in good standing. Upon written notice by the Union to the employer that any employee is not a member of the Union in good standing, the employer shall within five days discharge such employee. The Union shall attempt to replace such discharged employee immediately. Upon the Union's failure to do so, the employer may hire the replacement on the open market and the provision of Paragraph 2 hereof shall then apply.

4. New employees shall be considered on probation for a period of 2 weeks during which period they may be discharged at the discretion of the employer except for Union membership or activities, or race, creed, color, sex or political belief, and thereafter, no employee shall be discharged except for good cause.

5. Any foreman who spends $\frac{1}{3}$ or more of his time on regular shoe production becomes subject to this agreement. No foreman shall be permitted to

work on regular shoe production (not including samples, etc., which is normally done by a foreman) either during or outside regular working hours, unless the production employees normally working on that operation are also working at that time.

6. Apprentices or inexperienced workers with less than 3 months' experience in the shoe industry shall secure work permits from the Union within two weeks of their hiring and shall become members of the Union after 30 days of employment.

7. In the event the national labor laws are amended or repealed so as to validate any paragraph of Section III of the 1947-1948 agreement such paragraphs from the 1947-1948 agreement shall be immediately placed into full force and effect in this agreement and the corresponding paragraphs of this agreement shall be deleted and without any force or effect; all of said provisions are subject to any law covering same.

* * *

Received in evidence November 12, 1953.

GENERAL COUNSEL'S EXHIBIT No. 13-A

Milton S. Tyre
Lawyer

Milton S. Tyre
Richard J. Kamins

650 South Grand Avenue
Los Angeles 17
TRinity 2181

July 14, 1953.

Trina Shoe Company,
222 Main Street,
Venice, California.

Gentlemen:

In the collective bargaining agreement now in effect between your company and United Shoe Workers of America, Local 122, C.I.O., or in any collective bargaining agreement that has been proposed by said Union with your company, I am authorized by said Union to advise you as follows:

The Union has not been for several years last past, is not now, and does not intend to be enforcing the following provisions of Section III: (a) In paragraph 2, that provision which requires that all employees apply for membership in the Union no later than 30 days after their employment; and (b) Paragraph 6.

You are further advised that the Union hereby proposes formally to change the fourth sentence of

Section III, paragraph 2, referred to in said paragraph (a) above as follows: "All employees shall apply for membership in the Union no later than 30 days from and after the effective date of this agreement, whichever is the later."

You are also advised that the Union hereby proposes formally to delete paragraph 6 of Section III referred to in (b) above.

Furthermore, you are advised that whether or not the Union's proposal is accepted, the Union will construe the contract so as to conform to the proposed changes.

Very truly yours,

MILTON S. TYRE.

MST:BS

Registered

R.R.R.

[Stamped] Received July 15, 1953.

Received in evidence November 12, 1953.

GENERAL COUNSEL'S EXHIBIT No. 13-B

Milton S. Tyre

Lawyer

Milton S. Tyre

Richard J. Kamins

650 South Grand Avenue

Los Angeles 17

TRinity 2181

July 14, 1953.

California Footwear Co.,
222 Main Street,
Venice, California.

Gentlemen:

In the collective bargaining agreement now in effect between your company and United Shoe Workers of America, Local 122, C.I.O., or in any collective bargaining agreement that has been proposed by said Union with your company, I am authorized by said Union to advise you as follows:

The Union has not been for several years last past, is not now, and does not intend to be enforcing the following provisions of Section III: (a) In paragraph 2, that provision which requires that all employees apply for membership in the Union no later than 30 days after their employment; and (b) Paragraph 6.

You are further advised that the Union hereby proposes formally to change the fourth sentence of

Section III, paragraph 2, referred to in said paragraph (a) above as follows: "All employees shall apply for membership in the Union no later than 30 days from and after their first day of employment or from and after the effective date of this agreement, whichever is the later."

You are also advised that the Union hereby proposes formally to delete paragraph 6 of Section III referred to in (b) above.

Furthermore, you are advised that whether or not the Union's proposal is accepted, the Union will construe the contract so as to conform to the proposed changes.

Very truly yours,

MILTON S. TYRE.

MST:BS

Registered

R.R.R.

[Stamped] Received July 15, 1953.

Received in evidence November 12, 1953.

GENERAL COUNSEL'S EXHIBIT No. 14

March 18, 1953.

United Shoe Workers of America,
Local 122, C. I. O.,
617 Venice Blvd.,
Los Angeles 15, California.

Gentlemen:

Our Company agrees to recognize your Union as exclusive collective bargaining agent for all of our production employees effective immediately, providing you show us sufficient pledge and dues cards that you represent a majority of our production employees.

Yours very truly,

By /s/ MAURICE FELLMAN,

Title: President.

.....,
TRINA SHOE COMPANY.

Received in evidence November 12, 1953.

RESPONDENTS' EXHIBIT No. 14

Trina Shoe Co.
Costa Mesa, California
Beacon 6052

A Statement of Facts

In view of the fact that the United Shoe Workers Union has distributed leaflets headed by a statement bearing my signature, I feel that I must explain my connection with it.

Because of the many inaccuracies in the leaflet and the false inducements offered by the union, I do not want anyone to get the impression that my signature is in any way an endorsement of the union or their promises.

The facts are as follows: I was approached by the representatives of the union and presented with a contract which they asked me to sign. I took the position and signed a letter to the effect that I would not sign the employees to anything without their consent and demand.

Their efforts to sign a majority has led them to make extravagant promises and statements which are contrary to fact as follows.

Union scale does not offer \$1.00 minimum per hour as evidenced by section on wages taken from their contract and posted for your inspection. Wage increases are not intended by their contract as underlined in Paragraph 2C.

All Shoe Factories in Southern Calif. are not union. In fact, out of five factories making the same type and price shoe as ours only one is union.

These factories by name are:

L. A Shoe, Pasadena.....	Nonunion
EmBee, Los Angeles.....	Nonunion
Puritan Shoe Co, Los Angeles.....	Nonunion
Trina Shoe, Venice.....	Nonunion
Kay Shoe Co., Los Angeles.....	Union

Other benefits promised by the union you already have.

Namely:

- Paid Holidays
- Paid Vacation
- 4 Hours call in pay (State Law)
- Hospitalization
- Surgical Medical and Life Insurance

Note Also:

The union is offering you an application for \$1.00. This fee does not cover membership.

Our policy can be summed up as follows. We respect the right of any worker to seek employment without payment of fees or being subject to the prejudices of a union hiring hall.

Signed:

.....,
MAURICE FELLMAN,
Pres. Trina Shoe Co.

[At foot in longhand]: Any further questions, feel free to discuss with me.

Received in evidence November 24, 1953.

RESPONDENTS' EXHIBIT No. 18

March 19, 1953.

Milton S. Tyre, Esq.,
650 South Grand Avenue,
Los Angeles 17, California.

Dear Mr. Tyre:

Your letter of February 19th addressed to both California Footwear Company and Trina Shoe Company has been referred to me for reply on behalf of California Footwear Company. I regret the delay in answering.

The Union is incorrect in its position that Trina Shoe Company is the same as California Footwear Company. Trina Shoe Company is an independent enterprise which has been in existence upwards four years. It is in no sense a successor to California Footwear Company.

California Footwear Company ceased manufacturing operations some time ago and the Union had advanced notice of that fact. I am informed that when Trina Shoe Company commenced operations, it offered employment to those who worked at California Footwear Company, although, of course, there was no obligation on the part of Trina Shoe Company to do so.

California Footwear Company is confining its operations to merchandising and has ordered shoes from Trina Shoe Company.

I do not know whether Trina Shoe Company has responded to your letter and I am not authorized to answer for it, but I am informed that its answer would be the same.

Yours very truly,

RICHARD A. PERKINS.

RAP/hw

Received in evidence November 25, 1953.

RESPONDENTS' EXHIBIT No. 19

National Labor Relations Board
Twenty-First Region
111 West 7th Street
Los Angeles 14, California

December 4, 1953.

PRospect 4711, Ext. 881.

Richard A Perkins, Esquire,
608 South Hill Street,
Los Angeles, California.

Re: California Footwear Company and
Trina Shoe Company
Case No. 21-CA-1863

Dear Mr. Perkins:

You have already been served a copy of the charge in the above-entitled case, and a copy of our Motion to the Trial Examiner to reopen the hearing in Cases No. 21-CA-1659-1658.

In view of the fact that employee Jack Rosenthal turned down an unconditional company offer of reinstatement in May of 1953 (a fact undisputed in the record) it is the General Counsel's position that he thereby lost his right to reinstatement by reason of the alleged Section 8(a) (3) violation. Of course, said former employee, should he apply for employment in the future, is entitled to non-discriminatory consideration as a new applicant for employment.

We urge the companies, through you as their attorney, to immediately reinstate Eugene Piasek to the position of cutter, and invite you to participate with us in a case settlement conference at your earliest convenience. Pending such conference, and apart from it, we urge the immediate reinstatement of Eugene Piasek and, in that connection, we assure you that the General Counsel does not make, and at no time has made, any claim that cutter Jack Rosenthal is entitled to reinstatement (or back-pay after date of unconditional offer) by reason of the alleged Section 8(a) (3) discrimination.

Your early reply to this letter is earnestly solicited.

Very truly yours,

/s/ JEROME SMITH,
Attorney.

Received in evidence January 6, 1954.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,169

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JACK LEWIS AND JOE LEVITAN, a Copart-
nership Doing Business as CALIFORNIA
FOOTWEAR COMPANY,

and

TRINA SHOE COMPANY, a Corporation,

Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “Jack Lewis and Joe Levitan d/b/a California Footwear Company and United Shoe Workers of America, Local 122,” Case No. 21-CA-1659; “Trina Shoe Company and United Shoe Workers of America, Local 122,” Case No. 21-CA-1658; and “Jack Lewis and Joe Levitan

d/b/a California Footwear Company and Trina Shoe Company and United Shoe Workers of America, Local 122," Case No. 21-CA-1863.

Fully enumerated, said documents attached hereto are as follows:

1. Affidavit of service of Trial Examiner's order granting General Counsel's motion to strike the affirmative portion of the Respondents' answers mailed August 28, 1953, together with United States Post Office return receipts thereof. (Trial Examiner's Order is General Counsel's Exhibit 1-W and is contained in Volume III of the certified record.)

2. Stenographic transcript of testimony taken before Trial Examiner William E. Spencer on October 13, November 5, 10, 12, 13, 16, 17, 23, 24, and 25, 1953, together with all exhibits entered in evidence, together with rejected exhibits.

3. Affidavit of service of Trial Examiner's order granting General Counsel's motion to reopen the hearing to adduce evidence concerning the alleged discrimination against a certain person mailed December 8, 1953, together with United States Post Office return receipts thereof. (Trial Examiner's Order is General Counsel's Exhibit 22-G and is contained in Volume III of the certified record.)

4. Stenographic transcript of testimony taken before Trial Examiner James R. Hemingway on January 5, 6, and 14, 1954, together with all exhibits entered in evidence. (Annexed to item 2 herein.)

5. Trial Examiner Hemingway's order correcting transcript of testimony, dated April 4, 1954, together with affidavit of service and United States Post Office return receipts thereof.

6. Copy of Trial Examiner Hemingway's Intermediate Report and Recommended Order, dated April 28, 1954 (annexed to item 10 hereof); copy of order transferring cases to the Board, dated April 28, 1954, together with United States Post Office return receipts thereof).

7. Respondents' exceptions to Intermediate Report and Recommended Order received June 3, 1954.

8. General Counsel's exceptions to Intermediate Report and Recommended Order received June 4, 1954.

9. Stipulation, dated September 23, 1954, among the parties setting forth certain additional facts with respect to the sales by Respondent Trina Shoe Company to Respondent California Footwear Company, and made a part of the record herein. (See page 2, footnote 1 of Board's Decision and Order.)

10. Copy of Decision and Order issued by the National Labor Relations Board on October 31, 1955, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being there-

unto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 26th day of July, 1956.

/s/ FRANK M. KLEILER,
Executive Secretary.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 15169. In the United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Jack Lewis and Joe Levitan, a Copartnership Doing Business as California Footwear Company, and Trina Shoe Company, a Corporation, Respondents. Transcript of Record. Petition for enforcement of an order of the National Labor Relations Board.

Filed July 31, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15169

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JACK LEWIS AND JOE LEVITAN, a Copart-
nership Doing Business as CALIFORNIA
FOOTWEAR COMPANY,

and

TRINA SHOE COMPANY, a Corporation,

Respondents.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Jack Lewis and Joe Levitan, a copartnership doing business as California Footwear Company, (hereinafter called Respondent California), its partners, agents, successors and assigns, and Trina Shoe Company, a corporation, (hereinafter called Respondent Trina), its officers, agents, suc-

cessors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "Jack Lewis and Joe Levitan d/b/a California Footwear Company and United Shoe Workers of America, Local 122," Case No. 21—CA—1659; "Trina Shoe Company and United Shoe Workers of America, Local 122," Case No. 21—CA—1658; and "Jack Lewis and Joe Levitan d/b/a California Footwear Company and Trina Shoe Company and United Shoe Workers of America, Local 122," Case No. 21—CA—1863.

In support of this petition the Board respectfully shows:

(1) Respondents, Jack Lewis and Joe Levitan, doing business as a copartnership under the firm name of California Footwear Company, and Trina Shoe Company, a California corporation, are both engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 31, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent California, its partners, agents, successors and assigns, and Respondent Trina, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Gov-

ernment frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondents herein, and requiring Respondent California, its partners, agents, successors, and assigns, and Respondent Trina, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

NATIONAL LABOR RELA-
TIONS BOARD.

Dated at Washington, D. C., this 18th day of June, 1956.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NA-
TIONAL LABOR RELATIONS BOARD
AND PETITION TO SET ASIDE SAID
ORDER

Answer to Petition for Enforcement

Answering the Petition of the National Labor Relations Board for enforcement of its order, respondents admit, deny, and allege as follows:

1. Respondents admit the allegations of Paragraph (1) of the Petition, except that they deny that respondent Joe Levitan is a member of the partnership known as California Footwear Company, and allege that said partnership now consists of respondents Jack Lewis and Albert Lewis.

2. Answering Paragraph (2) of said Petition, respondents admit that on October 31, 1955, the Board stated its Findings of Fact and Conclusions of Law and issued an order directed to respondents, their officers, partners, agents, successors, and assigns, and that on the same date the Board's decision and order was served upon respondents by sending copies thereof postpaid bearing Government frank, by registered mail, to respondents' counsel; otherwise, respondents deny each and every allegation of said Paragraph.

3. Respondents admit the allegations of Paragraph (3) of said Petition.

Petition to Set Aside Order

Respondents respectfully petition the Court to set aside said order of the National Labor Relations Board, on the ground that said order and each and every portion thereof is unsupported by the evidence upon the whole record, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, contrary to Constitutional Rights, power, privilege, and immunity, in excess of statutory jurisdiction, authority, and limitations, and without observance of procedure required by law.

Dated: July 6, 1956.

/s/ RICHARD A. PERKINS,
Attorney for Respondents.

[Endorsed]: Filed July 10, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON
BY RESPONDENTS

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Come now respondents and pursuant to Rule 17(6) of the rules of this Court, file this statement of points on which they intend to rely in the above-entitled proceeding, and this cross-designation of parts of the record necessary for the consideration thereof:

I.

Statement of Points

1. In the particulars in which they are adverse

to respondents the Board's findings and order are not supported by substantial evidence on the record as a whole.

2. The Board's order is in excess of the Board's statutory authority and in contravention of constitutional guarantees in that it constitutes an attempt to enforce a labor contract in an administrative proceeding not conducted according to the course of the common law and without providing for trial by jury.

3. The Board's findings and order are arbitrary and capricious and constitute denial of due process of law, particularly in the following respects:

(a) The Board's General Counsel began by prosecuting respondents on the charge (among others) that they were practicing continuing discrimination against one Rosenthal by laying off Rosenthal, retaining one Piasek in employment, and refusing to reinstate Rosenthal. During the hearing, respondent Trina recalled Rosenthal in place of Piasek for the single job involved, informed the General Counsel thereof on November 23, 1953, and inquired whether the General Counsel whether he had any objection. The General Counsel refused to reply then or until December 4, 1953, at which time he first asserted that Piasek should have the job instead of Rosenthal. Yet the Board found that respondents committed discrimination by recalling Rosenthal rather than Piasek, without getting permission from the General Counsel.

(b) The Board found respondents guilty of unfair labor practice for failing to comply with a labor contract containing illegal compulsory union membership provisions. Yet the Board has found other employers guilty of unfair labor practice for entering into and enforcing illegal union security contract provisions and orderd them to cease giving effect to such contracts and to cease recognizing the labor organizations party to such contracts.

(c) As pointed out in the dissenting opinion of the Acting Chairman of the Board, the Board applied to respondents a different standard of liability in case of plant removal than it applied to a North Carolina employer.

Dated: September 3, 1956.

/s/ RICHARD A. PERKINS,
Attorney for Respondents.

[Endorsed]: Filed September 4, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON
BY THE BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 17 (6) of the rules of this Court, files this statement of points

upon which it intends to rely in the above-entitled proceeding, and this designation of parts of the record necessary for the consideration thereof:

I.

Statement of Points

1. Substantial evidence on the record as a whole supports the Board's finding that respondents, by interrogating their employees with respect to their affiliations with and attitudes toward Local 122, United Shoe Workers of America, and by surveillance outside that union's meeting hall during a membership meeting, interfered with, restrained and coerced their employees' right of self organization in violation of Section 8 (a) (1) of the Act.

2. Substantial evidence on the record as a whole supports the Board's findings that respondents refused employee Roark a job at their plant in Venice, California, because of her union membership, and discharged employee Piasek because of his testimony against them in the hearing herein before the Board's trial examiner, in violation of Sections 8 (a) (3) and (4) of the Act, respectively.

3. Substantial evidence on the record as a whole supports the Board's finding that respondent California Footwear Co., controlled the business operations at the plant in Venice, California, nominally operated by respondent Trina Shoe Company, and that it falsely represented the contrary to Local 122, United Shoe Workers of America, for the pur-

pose of getting rid of that union and avoiding the collective bargaining contract which it had executed with that union.

4. The Board properly determined, in view of the finding stated in paragraph 3, above, that respondent violated Section 8 (a) (5) of the Act by refusing to discuss with Local 122, United Shoe Workers of America, the transfer of their employees to their plant in Venice, California, by unilaterally imposing new conditions of employment at the Venice plant and refusing to recognize the aforesaid union as the representative of the employees at the Venice plant, and by refusing to continue in effect the terms of the pre-existing contract with said union after operations began at the Venice plant.

5. The Board's order is valid and proper under the National Labor Relations Act, as amended.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD.

Dated this 26th day of July, 1956.

[Endorsed]: Filed July 31, 1956.

IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JACK LEWIS AND JOE LEVITAN d/b/a CALIFORNIA FOOT-
WEAR COMPANY, AND TRINA SHOE COMPANY,
Respondents

On Petition for Enforcement of an Order of the National
Labor Relations Board

BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD

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FILED

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INDEX

	Page
Juisdiction	1
Statement of the case	2
I. The Board's findings of fact	3
A. The relationship between respondents California Footwear and Trina	3
B. Respondents' refusal to bargain with the Union	9
C. Respondents' coercive opposition to union organization at the Venice plant	12
D. Respondents' discrimination against employees Roark and Piassek	14
Summary of argument	19
Argument	22
I. Substantial evidence supports the Board's finding that California Footwear controlled operations at the Venice Plant	23
II. Substantial evidence supports the Board's findings that respondents' questioning of employees about their union affiliations and surveillance of employees attending a Union meeting violated Section 8 (a) (1) of the Act	26
III. Substantial evidence supports the Board's finding that respondents unlawfully discriminated against employees Roark and Piassek	30
IV. The Board properly found that respondents violated Section 8 (a) (5) of the Act by refusing to discuss with the Union the transfer of employees to the Venice plant, by discontinuing the existing contract and establishing new terms of employment, and by refusing to recognize the Union as the representative of the employees at the Venice plant	35
Conclusion	43
Appendix	44

AUTHORITIES CITED

CASES:	
<i>Andrews v. N.L.R.B.</i> , 236 F. 2d 44 (C.A. 9)	23, 26
<i>E. Anthony & Sons Inc. v. N.L.R.B.</i> , 163 F. 2d 22 (C.A. D.C.), certiorari denied, 332 U.S. 773	29
<i>Brooks v. N.L.R.B.</i> , 348 U.S. 96	38
<i>Brown Truck & Trailer Mfg. Co.</i> , 106 NLRB 999	40
<i>Butler Bros. v. N.L.R.B.</i> , 134 F. 2d 981 (C.A. 7), certiorari denied, 320 U.S. 789	23, 24
<i>Franks Bros. Co. v. N.L.R.B.</i> , 321 U.S. 702	38

	Page
<i>Dickey v. N.L.R.B.</i> , 217 F. 2d 652 (C.A. 6)	23, 24
<i>E. E. Donnelley & Sons v. N.L.R.B.</i> , 156 F. 2d 416 (C.A. 7), certiorari denied, 329 U.S. 810	29
<i>Inland Steel Co v. N.L.R.B.</i> , 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960	37
<i>Iob v. Los Angeles Brewing Co.</i> , 183 F. 2d 398 (C.A. 9)	42
<i>International Association of Machinists, Lodge 35 v. N.L.R.B.</i> , 311 U.S. 72	31, 43
<i>Kearney & Trecker Corp. v. N.L.R.B.</i> , 210 F. 2d 852 (C.A. 7), certiorari denied, 348 U.S. 824	42
<i>McQuay-Norris Mfg. Co.</i> , 15 LRRM 1703 (W.L.B.)	42
<i>N.L.R.B. v. Anderson et al.</i> , 206 F. 2d 409 (C.A. 9), certiorari denied, 346 U.S. 938 (C.A. 9)	28
<i>N.L.R.B. v. Bank of America</i> , 130 F. 2d 624 (C.A. 9), certiorari denied, 318 U.S. 791	31
<i>N.L.R.B. v. E. C. Brown</i> , 184 F. 2d 829 (C.A. 2)	23
<i>N.L.R.B. v. Carlton Wood Products Co.</i> , 201 F. 2d 863 (C.A. 9)	38
<i>N.L.R.B. v. Condenser Corp.</i> , 128 F. 2d 67 (C.A. 3)	23, 24
<i>N.L.R.B. v. Crompton-Highland Mills, Inc.</i> , 337 U.S. 217	41
<i>N.L.R.B. v. Dant</i> , 207 F. 2d 165 (C.A. 9)	31, 32
<i>N.L.R.B. v. Dayton Coal & Iron Corp.</i> , 208 F. 2d 394 (C.A. 6)	23
<i>N.L.R.B. v. Efco Manufacturing, Inc.</i> , 203 F. 2d 548 (C.A. 1)	42
<i>N.L.R.B. v. Electric City Dyeing Co.</i> , 178 F. 2d 980 (C.A. 3)	28
<i>N.L.R.B. v. Geigy Co., Inc.</i> , 211 F. 2d 553 (C.A. 9), certiorari denied, 348 U.S. 821	38
<i>N.L.R.B. v. Geraldine Novelty Co.</i> , 173 F. 2d 14 (C.A. 2)	42
<i>N.L.R.B. v. Gerity Whitaker Co.</i> , 137 F. 2d 198 (C.A. 6)	37
<i>N.L.R.B. v. Grower-Shipper Vegetable Ass'n</i> , 122 F. 2d 368 (C.A. 9)	23, 28
<i>N.L.R.B. v. Home Dairies Co.</i> , 211 F. 2d 784 (C.A. 9)	28
<i>N.L.R.B. v. Hunter Engineering Company</i> , 215 F. 2d 916 (C.A. 8)	29
<i>N.L.R.B. v. Idaho Egg Producers, Inc.</i> , 229 F. 2d 821 (C.A. 9)	38
<i>N.L.R.B. v. Andrew Jergens Co.</i> , 175 F. 2d 130 (C.A. 9), certiorari denied, 338 U.S. 827	38
<i>N.L.R.B. v. Knickerbocker Plastic Company, Inc.</i> , 218 F. 2d 917 (C.A. 9)	33, 35
<i>N.L.R.B. v. Long Lake Lumber Co.</i> , 138 F. 2d 363 (C.A. 9)	23, 24
<i>N.L.R.B. v. McCatron</i> , 216 F. 2d 212 (C.A. 9), certiorari denied, 348 U.S. 943	23, 24, 27
<i>N.L.R.B. v. Martin</i> , 207 F. 2d 655 (C.A. 9), certiorari denied, 347 U.S. 917	34
<i>N.L.R.B. v. May Department Stores Co.</i> , 326 U.S. 376	41
<i>N.L.R.B. v. O'Keefe & Merritt Mfg. Co.</i> , 178 F. 2d 445 (C.A. 9)	23
<i>N.L.R.B. v. Oklahoma Transportation Co.</i> , 140 F. 2d 509 (C.A. 5)	34
<i>N.L.R.B. v. Osbrink</i> , 218 F. 2d 341 (C.A. 9), certiorari denied, 349 U.S. 928	31
<i>N.L.R.B. v. Pacific Mills</i> , 207 F. 2d 905 (C.A. 4)	24
<i>N.L.R.B. v. Public Service Transport</i> , 177 F. 2d 119 (C.A. 3)	42
<i>N.L.R.B. v. Badcliffe</i> , 211 F. 2d 309 (C.A. 9), certiorari denied, 348 U.S. 833	28, 31

	Page
<i>N.L.R.B. v. Reeves Rubber Co.</i> , 153 F. 2d 340 (C.A. 9)	31
<i>N.L.R.B. v. Saxe-Glassman Shoe Corp.</i> , 201 F. 2d 238 (C.A. 1)	28
<i>N.L.R.B. v. Shannon</i> , 208 F. 2d 545 (C.A. 9)	38, 41
<i>N.L.R.B. v. Somerset Classics, Inc.</i> , 193 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 816	23
<i>N.L.R.B. v. Southport Petroleum Co.</i> , 315 U.S. 100	23
<i>N.L.R.B. v. Standard Oil Co.</i> , 124 F. 2d 895 (C.A. 10)	29
<i>N.L.R.B. v. Sunnyland Packing Co.</i> , 211 F. 2d 923 (C.A. 5)	29
<i>N.L.R.B. v. Swinerton</i> , 202 F. 2d 511 (C.A. 9), certiorari denied, 346 U.S. 814	38
<i>N.L.R.B. v. Taylor Mfg. Co.</i> , 222 F. 2d 719 (C.A. 5)	37
<i>N.L.R.B. v. Texas Independent Oil Company, Inc.</i> , 232 F. 2d 447 (C.A. 9)	34
<i>N.L.R.B. v. Vermont American Furniture Corp.</i> , 182 F. 2d 842 (C.A. 2)	28
<i>N.L.R.B. v. Wagner Transportation Co.</i> , 227 F. 2d 200 (C.A. 9), certiorari denied, 351 U.S. 919	26, 30
<i>N.L.R.B. v. Warren Co.</i> , 350 U.S. 107	38
<i>N.L.R.B. v. West Coast Casket Co.</i> , 205 F. 2d 902 (C.A. 9)	27, 31, 38
<i>North Whittier Heights Citrus Ass'n v. N.L.R.B.</i> , 109 F. 2d 76 (C.A. 9), certiorari denied, 310 U.S. 632	28

STATUTE:

National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C., Sec. 151 et seq.)	
Section 8 (a) (1)	17, 26
Section 8 (a) (3)	17
Section 8 (a) (4)	17
Section 8 (a) (5)	17, 35
Section 8 (d)	37
Section 9 (a)	37
Section 10 (c)	2
Section 10 (e)	2

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 15169

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JACK LEWIS AND JOE LEVITAN d/b/a CALIFORNIA FOOT-
WEAR COMPANY, AND TRINA SHOE COMPANY,
Respondents

On Petition for Enforcement of an Order of the National
Labor Relations Board

BRIEF FOR THE NATIONAL RELATION BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce its order (R. 370-372)¹ issued against respondents on October 31, 1955, following the usual proceedings

¹References to portions of the printed record are designated "R". Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), hereafter called the Act.² This Court has jurisdiction of the proceeding pursuant to Section 10 (e) of the Act, the unfair labor practices having occurred at respondents' plants in Los Angeles and Venice, California, within this judicial circuit.³ The Board's decision and order are reported in 114 NLRB 765.

STATEMENT OF THE CASE

The Board found that respondents committed unfair labor practices under the Act by discriminating against one employee because of her union membership, by discharging another employee because of his testimony against respondents in the hearing in this case, by refusing to bargain with the union entitled to represent their employees, by questioning employees with respect to their union affiliation, and by engaging in surveillance of employees attending a union meeting. Most of the foregoing conduct was found to have occurred at the shoe manufacturing plant in Venice, California, which was operating under the name of respondent Trina. The Board found, however, that Trina was in fact controlled by and was the "alter ego or agent" of respondent California Footwear, which had been engaged in shoe manufacturing at a leased

² The relevant provisions of the Act are set forth in the Appendix, *infra*, pp. 44-47.

³ Respondents are engaged in the manufacture and sale of shoes and other footwear, and ship substantial amounts of their products in interstate commerce (R. 132; 259-260). No jurisdictional issue is presented.

plant in the city of Los Angeles prior to the institution of operations at Venice. Accordingly, the Board entered its unfair labor practice findings and remedial order against both respondents. The subsidiary facts upon which the foregoing findings are based may be summarized as follows:

I. THE BOARD'S FINDINGS OF FACT

A. The relationship between respondents California Footwear and Trina

During 1952 and until the end of February 1953, California Footwear manufactured and sold shoe products at leased premises in Los Angeles (R. 33-35; 161, 192). In the fall of 1952, however, the co-partners of California Footwear, Jack Lewis and Joe Levitan, leased new premises for their business in Venice, California, about 15 miles' distance from the Los Angeles plant (R. 35; 138, 264-265). This action was prompted by a threatened increase in rent upon expiration of their Los Angeles lease in March, 1953, and by medical advice given to Lewis that he work closer to his home in Santa Monica, California (R. 35; 262-264). Shortly thereafter, Maurice Fellman, employed by California Footwear as a pattern maker, suggested to Lewis and Levitan that in view of the expiration of the Los Angeles lease and Lewis' poor health, the manufacture of shoes for California Footwear be performed by Trina, a company owned by Fellman and his wife (R. 35-36; 166, 168, 174, 246-247, 281-282, 285-286). Trina had been producing shoes over a period of several years in Costa Mesa, a small town to the south of Los Angeles. In 1952, however, Trina discontinued oper-

ations because of lack of operating capital and Fellman went to work for California Footwear (R. 34; 281-282, 290-291). Fellman told Lewis and Levitan that Trina could begin manufacturing operations at once if California Footwear would advance Trina money to discharge its debts and to provide operating capital (R. 36; 168, 265, 269, 297-298). Lewis and Levitan agreed to the plan, provided Fellman would occupy the Venice premises (R. 36; 168, 297-298). Accordingly, a sublease of the Venice plant was made to Trina, and an agreement to manufacture, buy and sell shoe products was executed between California Footwear and Trina (R. 36-37; 324-334).

The sublease to Trina was made for the same period of time and for the same rental amount stated in the principal lease (R. 37; 326-327). The sublease, however, reserved a store room and office room for occupancy by California Footwear and provided that additional office space was to be available for the joint use of Trina and California Footwear (R. 334). The agreement to buy and sell provided that Trina should manufacture and sell to California Footwear all of the latter's requirements; that all merchandise be in accordance with California Footwear's specifications and subject to its inspection in process of manufacture; that California Footwear should provide "technical advice and assistance" in manufacturing, for which an allowance should be made in prices to be agreed upon before entering production on any particular order (R. 324-325). Trina began operations at the Venice plant pursuant to the foregoing agreement in the latter part of December 1952,

and continued its relationship with California Footwear throughout the events in this case (R. 38; 285, 315).

At the outset of operations at Venice, Trina utilized its own machinery which had been moved from Costa Mesa (R. 38; 181). When California Footwear's lease at the Los Angeles plant expired at the end of February 1953, however, its machinery was also transferred to the Venice plant, even though it duplicated Trina's machinery and was unused in many instances (R. 38-39; 182, 178, 180-281, 297). Nonetheless, Trina was billed for the cost of transporting this machinery to the Venice plant, and also paid the rental amounts on equipment which California Footwear held on long term lease (R. 38-39; 182, 278). All other costs of operation were similarly either paid for by California Footwear and billed by it to Trina, or were paid by Trina from advancements made by California Footwear (R. 30; 161, 269). In addition California Footwear loaned Trina \$3500, secured by a chattel mortgage on Trina's machinery and equipment, to retire Trina's outstanding indebtedness (R. 38; 265, 277, 335-346). Against the sums of money thus furnished by California Footwear for business operations Trina was credited for the price of the shoes which it processed for California Footwear (R. 40; 161-162). Pricing on lots of shoes was arrived at on the basis of estimated costs of production (R. 39; 298-301). No percentage amount representing profit to Trina was added to the cost figure; neither party expected the prices paid by California Footwear to cover more than manufacturing costs (R. 39-40; 300-301). No attempt was

made to fix the value of the advice and assistance rendered Trina by California Footwear in the production of shoes, nor for the use of California Footwear's machinery (R. 39; 273-275, 635-637). The rent paid by Trina, however, was actually only \$200 a month rather than the \$275 called for by the lease, the difference representing an adjustment for the occupancy by California Footwear of a portion of the leased premises (R. 38; 170, 273-274, 279-280, 291-292). Periodic bookkeeping balances were taken on the accounts of the parties and at the end of their contractual relationship on January 1, 1954, it appears that Trina was somewhat in debt to California Footwear (R. 40; 315, 319-320). The price amounts credited to Trina by California Footwear constituted, with minor exceptions, the only source of Trina's income from manufacturing, as Trina sold substantially all of its production to California Footwear (R. 40; 268).

Upon moving to the Venice plant Fellman continued to perform the same pattern making job in which he had been employed by California Footwear, and at the same salary—\$80.00 a week (R. 42; 166, 169, 173-174). He also exercised general supervisory authority in the plant, participated in the hiring and discharging of employees, and signed the paychecks on behalf of Trina (R. 43, 47, 49; 170, 174, 177-178).

California Footwear's partners also assumed active roles in Trina's operations, particularly following the termination of the lease of the Los Angeles plant in February 1953. Thus, both partners spent full working time at the Venice plant, except when Lewis' sales work necessitated his absence (R. 43-44, 49-50;

171, 175-176, 234-235, 272). Lewis frequently interviewed applicants for employment; on occasion he advised Fellman as to whether the applicants should be hired, and on other occasions hired them directly (R. 43-44; 222-223, 226-227, 240, 266-267). In one instance he represented to a prospective employee that he was the proper person to see about jobs at Venice (R. 44; 239-240). Lewis also spent considerable time on the factory floor instructing employees how to operate their machines or otherwise perform their jobs and inspecting the products in the process of manufacture (R. 49-50; 176, 218, 220-221, 267-268, 290). When Fellman suggested that the entire shop be put on piece rates, Lewis indicated approval, and the system was tried for one week, at the end of which time the former pay system was reinstated at Lewis' direction (R. 47-48; 230-231, 177-179). In addition, Lewis made corrections in piece rate computations for particular employees, and on one occasion Fellman told an employee that such adjustments could be made only by Lewis (R. 47; 232).

Joe Levitan, who had been in charge of production at the Los Angeles plant, also participated actively in the hiring and firing of employees, and in their supervision (R. 43-44, 49-51; 171-172, 173, 207-209, 216-218, 220-221, 290, 295-296, 306). Levitan's principal occupation however, was to inspect shoes at all stages of production and to oversee the packing and shipping operation which was handled on floor area held by Trina under the sublease (R. 49-51; 171-172, 294-295, 305-306). He regularly notified employees when overtime work would be necessary, and ordinarily

assumed responsibility for all operations whenever Fellman was absent (R. 49-51, 53; 177, 237, 290, 294-295, 305-306).

Jack Lewis' son, Albert Lewis, also held a supervisory job at the Venice plant (R. 42; 164, 169). He had been employed at the Los Angeles plant before his employment at Venice (R. 33). Unlike his father and Levitan, Albert Lewis was a salaried employee of Trina. Indeed, during the course of the Venice operations Albert's salary was increased so as to exceed that of Fellman, an occurrence which Fellman complained of to an employee (R. 42; 169-170, 236).

The arrangement between Trina and California Footwear, as described above, continued until the end of 1953, at which time the sublease and other working agreements were terminated (R. 52, 55; 315). Fellman spent considerably less time at the Venice plant in the latter part of 1953, after it had been decided that the arrangement with California Footwear would not be continued, and during his absence Albert Lewis or Levitan took charge of operations (R. 52; 177, 180-181, 296-297, 304). At the beginning of 1954 the Venice plant was no longer in operation; however, California Footwear's partners were planning to resume production either under an arrangement similar to that worked out with Fellman, if they could "get hold of somebody satisfactory," or by operating the plant directly as had been the case at the Los Angeles location (R. 52; 320).

B. Respondents' refusal to bargain with the Union

1. *California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant*—United Shoe Workers of America, Local 122, herein called the Union, had been certified by the Board as the bargaining representative of California Footwear's employees in August, 1951 (R. 32-33; 159). A collective bargaining contract between the Union and California Footwear, executed on October 1, 1952 and containing an automatic renewal date of September 30 in the absence of notice to terminate, was in effect at the time that California Footwear transferred its operations to Venice (R. 56; 350-355).

In January, 1953, Ernest Tutt, organizer for the Union, visited the Los Angeles plant and inquired of Jack Lewis about rumors he had heard that the Los Angeles premises were to be vacated and a new shop was to be opened in Venice (R. 57; 193-195, 265-266). Lewis stated that he was in poor health and had been advised by his doctor "that he should definitely cease having anything to do with operating or running a shoe factory," as a result of which California Footwear "was going out of business" (R. 57; 194). Tutt asked about the Venice plant, and added that he "was anxious that as many of the employees of the California plant would be reemployed at Venice plant as was possible" (R. 57; 194). Lewis, however would not discuss this matter, stating that the Venice shop was "to be owned and run by Mr. Fellman," that "he [Lewis] had nothing to do whatsoever with the hiring or running of the Venice plant, and that [Tutt]

would have to see Mr. Fellman and talk to him about that" (R. 57-58; 194-195, 266).

2. *The refusal at the Venice plant to recognize or deal with the Union*—The working conditions established at the Venice plant were substantially different from those provided in the Union's contract with California Footwear. Thus, the employees at Venice had a lower minimum rate of pay, no cost-of-living bonus, no reporting-in pay, no daily time-and-a-half for overtime work, and less attractive health and welfare benefits (R. 46; 182-191).

Tutt visited Fellman at the Venice plant shortly after his conversation with Lewis to discuss the question of employee representation and the conditions of their employment (R. 58; 195-197). He presented Fellman with a copy of the Union's contract with California Footwear, which he stated was also applicable at the Venice plant (R. 59; 196-197). Fellman took the contract but suggested that Tutt return at a later date to discuss the matter, whereupon Tutt left (R. 58; 197). Following a second and equally inconclusive meeting between Fellman and Tutt, the Union on February 19 wrote a letter through its counsel to both California Footwear and Trina, stating its position as follows (R. 59; 348-349):

It is the Union's position that the firm known as Trina Shoe Company in truth and in fact is actually California Footwear Company. It is the Union's position that the contract made between California Footwear Company and the Union last year continues to be fully binding upon the firm known as Trina Shoe Company.

This letter shall also serve as formal notice upon you that . . . all of the employees engaged at the old job at 253 South Los Angeles, Los Angeles, California request employment on jobs which they are capable of performing at the first time that the job becomes available.

In a reply to this letter counsel for California Footwear wrote the Union that Trina was wholly independent, and that California Footwear had "ceased manufacturing operations some time ago" (R. 59; 363-364). Fellman, meanwhile, persistently refused to recognize the Union or to put the contract into effect. On March 18 Fellman signed a statement at Tutt's request to the effect that the Union would be recognized as the employees' bargaining representative if a majority of them so designated it, but thereafter Fellman refused to acknowledge the authenticity of some of the employee dues cards that Tutt presented him in support of the Union's majority claim (R. 60, 63-65; 198, 100-201, 203, 287-289). Fellman also raised certain objections to the contract which the Union had presented to him, but when Tutt yielded on these matters, Fellman stated that the contract was unacceptable for other unspecified reasons (R. 66-67; 204-205). Fellman finally made plain to Tutt that, irrespective of his commitment to recognize the Union upon a showing of majority support, he would not recognize it unless certified by the Board (R. 65; 289).

C. Respondents' coercive opposition to union organization at the Venice plant

Both Jack and Albert Lewis and Fellman made plain their opposition to the Union from the time that the Venice plant began operations. Thus, shortly after employees Charlotte Parker and Lois Murray were hired, Jack Lewis asked them while at work whether they had been asked to join the Union (R. 73; 221). Upon being given a negative reply, Lewis stated that there were "some girls in the plant trying to get something started", and that there were "always a few of those in every plant" (*ibid.*). On another occasion Lewis called employee Lois Murray into his office and again asked whether she had joined the Union, adding that she should not do so, "because [she] would be out a lot of money paying the union dues" (R. 73; 224). Lewis put the same question to employee Murray at a later date, and when Murray told him this time that she had joined the Union, Lewis asked her to identify the person who had solicited her membership, and observed that "it was only someone who was trying to be smart" (R. 73-74; 224-225). Similarly, Lewis questioned another employee, Eugene Piasek, as to his union affiliation when he applied for work, and hired him after Piasek falsely stated that he had been expelled from the union as a result of an argument with a union business agent (R.74; 226-227). Sometime thereafter, employee Piasek, in a conversation with Albert Lewis, asked the latter if it would not be better for California Footwear to accept the Union rather "than to run away from [it]" (R. 75; 233). Albert Lewis replied that the company

had lost money the first year in which the Union had been recognized, and that the business would "move out to another city" if the Union should "catch up with them over here" (*ibid.*).

For his part, Fellman expressed his opposition to the Union in a speech given to the employees at the Venice plant in March 1953 (R. 60-62; 209-210), and also in his questioning of various employees. Thus, a few days after his speech, Fellman, while repairing a machine operated by employee Linda Murray, told Murray that he was angry with her because she had "signed that union card" (R. 81-82; 243-244). When Murray protested that she had not signed a card, Fellman replied "Yes, you did. I know all of them that signed it," and turning to employee Aldea Callahan who stood nearby, asserted "You did too" (*ibid.*). Shortly thereafter Fellman also questioned a third employee, Alice Dupuis, as to why she had signed a union card (R. 82; Tr. 480). Fellman asked still another employee, Anna Cherry, what she thought about the Union, and went on to say "That the union was no good, that they wouldn't do anything for [the employees], and that the union could close the shop down and then everyone would be out" (R. 74; 209).

A further manifestation of Jack Lewis' concern lest the Union organize the employees occurred after working hours on April 14, 1953, when he parked his car across the street from a building in which the Union had scheduled a meeting and observed the employees who attended (R. 76-78; 227-228, 236-238, 318-319). On his way to the meeting employee Piasek noticed Lewis and stopped briefly to speak with him

(*ibid.*). Lewis stated in the course of their conversation, "I thought you told me you were not a union member" (R. 77; 228-229). Piasek stated that he just wanted to see what was going on, and continued on to the meeting, calling the attention of some of the employees outside the building to Lewis' car (R. 77; 229).

D. Respondents' discrimination against employees Roark and Piasek

1. *Respondents' discriminatory refusal to offer Roark employment at the Venice plant*—Only four employees from the Los Angeles plant were hired at the new location in Venice (R. 86; 293). Three of these were mentioned to Lewis by Fellman as persons he wished to have work at the Venice location (R. 86; 292-293). All four were required to be Union members under the existing collective bargaining agreement with California Footwear, but each of the transferred employees ceased paying Union dues upon starting work at Venice, and was thereafter suspended from Union membership for that reason (R. 86; 303-304).

A fifth Los Angeles plant employee, Blanche Roark, was also among those whom Fellman requested to have transferred to the Venice plant, but she was refused employment at the new location. Employee Roark had served as chief shop steward for the Union during the last year of her employment for California Footwear, which had begun in 1950 (R. 84; 211, 214). Late in 1952, when Roark heard that the Venice plant would

be open, she asked Fellman for a job, and Fellman indicated that he would like to have her work for him (R. 84; 212-213). She was the single employee, however, of those requested by Fellman, who was not offered a job at the Venice plant when her employment ended on January 30 at the Los Angeles plant (R. 86; 211, 292-293).

On February 5, 1953, Roark again applied to Fellman at the Venice plant for employment (R. 84; 212-213, 215-216, 293-294). Although there was work available at that time, Fellman told Roark that he would telephone her in two days (R. 84; 213, 294). Fellman did not call her, and when Roark again inquired about a job, Fellman once more put her off, telling her that he could not use her at that time but that he would call her later (R. 84; 213). However, Fellman did not thereafter call her, until months later, after the complaint in this case was filed against respondents (R. 84-85; 214, 286-287).

*2. Respondents' discriminatory discharge of Employee Piasek because of his testimony before the Trial Examiner in this case*⁴—Employee Piasek was regularly employed as a cutter at the Venice plant from early in April until mid-summer 1953, when operations closed down for several weeks (R. 104-105; 225-226, 233-234). On October 26, Piasek resumed his

⁴ The charge alleging Piasek's discriminatory dismissal was filed after the hearing at which he testified was closed. On motion of the General Counsel of the Board, however, the hearing was thereafter reopened, the complaint amended to allege the violation pertaining to Piasek, and evidence pertaining thereto was received as a part of the same case (R. 18-21, 306-322).

job, and worked fairly regularly until November 5, when he was told that there was no work available at that time (R. 106; 309-313). On November 10 Piasek attended the hearing before the Trial Examiner in this case, having been called as a witness against respondents (R. 107; 310-312). The following day, during which the hearing was in recess, Piasek reported to the Venice plant, and was called into Jack Lewis' office where Lewis asked him "Gene, why do you have to testify against me?" (R. 107; 312). Piasek replied "Listen, Jack, you do such unfair labor practices over here . . . everybody wants to testify against you" (R. 107; 312).

When the hearing was resumed on Friday, November 13, Lewis approached Piasek in the hearing room and told him to report for work on the following Monday. Piasek, who had not worked for several days, had not been called to the witness stand, but indicated that he would be on the job unless he had to testify on that day (R. 108; 312-313). The following day, Saturday, Lewis made an unsuccessful attempt to find a permanent replacement for Piasek (R. 108-109; 321-322). The person whom he contacted for the job was already employed; nonetheless, Lewis stated to him that he (Lewis) expected "to get straightened out [with the Union] the beginning of next week . . . and we may get together again" (R. 108; 321-322).

On Monday, November 16, Piasek testified as a witness for the General Counsel of the Board with respect to Lewis' questioning him about his Union membership, Lewis' surveillance at the Union meeting

of April 14, and various facts relating to the control exercised by the Lewises and Joe Levitan over the Venice operations (R. 225, *et seq.*). Piasek reported for work at the Venice plant the next day, in accordance with Lewis' instructions, but was told on his arrival that he was not needed, and that he would be called when there was work for him (R. 109; 313). Piasek was never recalled thereafter. A few days later, the cutter's job was offered on a permanent basis to another employee (R. 110; 306-308, 315-317).

II. THE BOARD'S DECISION AND ORDER

Upon the foregoing facts, the Board found, one member concurring in part and dissenting in part, that respondents had committed violations of Section 8 (a) (1), (3), (4) and (5) of the Act.⁵ The refusal to hire employee Roark at the Venice plant, and the dismissal of employee Piasek were determined to constitute unfair labor practices under Sections 8 (a) (3) and (4) of the Act, respectively, the former

⁵ Member Rodgers agreed with the majority that respondent Trina was the agent of respondent California Footwear in operating the Venice plant, and concurred with respect to the finding of violations of Section 8 (a) (1) based on respondents' interrogation and surveillance of employees, of Section 8 (a) (4) based on the discharge of employee Piasek, and of Section 8 (a) (5) based on the refusal to discuss with the Union the transfer of the Los Angeles employees to the Venice plant (R. 133, 146). Member Rodgers, however, dissented from the findings that employee Roark was unlawfully discriminated against, and that additional violations of Section 8 (a) (5) were committed by the refusal to recognize the Union as representative of the Venice plant employees, the repudiation of the existing contract, and the unilateral substitution of different terms and conditions of employment at the Venice plant (R. 146-157).

found to have been motivated by Roark's Union affiliation and the latter by Piasek's testimony against respondents in this case (R. 116, 132-133, 140-142). The Board held that Lewis' questioning of employees Parker, Lois Murray, and Piasek about their Union membership, his surveillance of the employees attending the Union meeting of April 14, and Fellman's questioning of employees Linda Murray, Callahan, Dupuis and Cherry about their affiliation with and attitude toward the Union constituted interference, restraint and coercion of employees in their right to self-organization and thus violations of Section 8 (a) (1) of the Act (R. 83, 132-133). Finally, the Board concluded that although the Venice plant was leased by California Footwear for reasons having nothing to do with the Union, the Venice operation was nonetheless controlled by California Footwear, and that it was operated in Trina's name as a subterfuge in an attempt "to get rid of the Union" and to escape the effect of the contract which California Footwear had executed with the Union (R. 135). From this determination it followed in the Board's opinion not only that California Footwear was responsible along with Trina for the unfair labor practices committed at the Venice plant, but also that California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant, the refusal to keep in effect the terms of the existing contract, the unilateral imposition of working conditions at Venice, and the refusal to recognize the Union as the representative of the employees at Venice all

constituted violations of the bargaining requirements of Section 8 (a) (5) of the Act (R. 139-140).⁶

To remedy the foregoing violations, the Board's order requires respondents⁷ to cease and desist from discriminating against their employees because of their Union membership or because of testimony given in proceedings under the Act, from refusing to bargain collectively with the Union, and from in any other manner interfering with their employees' right of self-organization. Affirmatively, the Board's order requires respondents to reinstate employee Piasek, to make him and employee Roark (who had refused an offer of reinstatement made prior to the hearing (R. 214)), whole for any loss of earnings suffered by reason of the discrimination against them, to bargain collectively on request with the Union, and to post appropriate notices (R. 142-145).

SUMMARY OF ARGUMENT

I. The Board properly found that Trina was the "alter ego or agent" of California Footwear in operating the Venice plant and that California Footwear was therefore jointly responsible with Trina for the unfair labor practices which occurred at Venice. Trina was in every important respect subject to Cali-

⁶ In addition, the Board, in agreement with the trial examiner, concluded that there was insufficient evidence to support the allegations in the complaint charging that employees Anna Cherry and Jack Rosenthal had been discriminatorily discharged, and dismissed the complaint in those respects (R. 98, 104, 145).

⁷ The Board made its order against Trina applicable only to the extent that Trina "has acted or in the future may act on behalf of" respondent California Footwear (R. 142).

fornia Footwear's control. It was wholly dependent upon California Footwear for operating capital, had mortgaged its machinery to California Footwear, and was responsive to California Footwear's decisions with respect to employment practices and production methods. The goods manufactured by Trina and delivered to California Footwear, moreover, were priced to cover only manufacturing costs, including a salary for Trina's owner who served as a general foreman, and did not allow for any profit. The record thus establishes a complete absence of independent authority on the part of Trina.

II. The frequent instances of respondents' interrogation of the employees as to their union attitudes and affiliations occurred in a context of open hostility to the Union. Accordingly, on settled authority this interrogation was violative of Section 8 (a) (1) of the Act. Similarly, the Board's finding that Lewis' surveillance of employees entering a Union meeting constituted a violation of the same statutory provision is supported by the uniform holdings of the courts of appeals. Respondents' defense before the Board to the interrogation and surveillance charges rested on testimony which the Trial Examiner and the Board discredited; the Board's rulings in this respect should not, on the record in this case, be overturned on judicial review.

III. Substantial evidence supports the Board's finding that respondents unlawfully discriminated against employees Roark and Piasek. Although employee Roark was an experienced and competent worker whom Fellman requested to be transferred to

Venice, she was refused a job at the Venice plant for a false reason. Her status as a Union steward at the Los Angeles plant and Lewis' determination that the Venice plant be staffed by non-union employees furnish the only reasonable explanation for rejecting her application for employment.

Similarly, the precipitate discharge of employee Piasek following his testimony against respondents in the hearing in this case together with the inadequacy of the excuses made for the discharge amply support the Board's conclusion that he was fired because of his testimony.

IV. In view of the fact that California Footwear controlled operations at the Venice plant, it was obliged under the Act to discuss with the Union the question of transferring employees to Venice upon cessation of business at the Los Angeles plant. California Footwear's refusal to consult with the Union on this matter upon the latter's request therefore constituted a violation of Section 8 (a) (5) of the Act. Because of California Footwear's unfair labor practice in this respect, it was not entitled to refuse recognition of the Union at the Venice plant on the ground that the Union was unable to show support by a majority of the employees at the new location. The Board could reasonably conclude that, absent California's unlawful refusal to negotiate, an agreement might have been reached by which substantially the same work force would have been maintained at the Venice plant as existed at the Los Angeles plant. And it is settled law that a certified bargaining representa-

tive does not lose its status where, as here, its loss of majority support may reasonably be attributed to employer unfair labor practices. It also follows from respondents' continuing obligation to recognize the Union that the unilateral imposition of new terms and conditions of employment at the Venice plant and the termination of the existing contract constituted violations of Section 8 (a) (5) of the Act.

ARGUMENT

The Board's imputation of liability to respondent California Footwear for the unfair labor practice findings based on interference and discrimination at the Venice plant, nominally operated by respondent Trina, rests on its factual determination that the Venice operation was controlled by California Footwear, and that Trina was merely the "alter ego or agent" of California Footwear. With respect to the refusal to bargain finding moreover, the existence of the unfair labor practice itself turns on whether the Venice operation was simply a new location at which California Footwear was carrying on the same business. It was upon this premise that the Board concluded California Footwear was required to discuss with the Union the transfer of its employees to the Venice plant, and to recognize the Union as the representative of the employees at the Venice plant. Accordingly, before turning to the unfair labor practices which have been found in this case, it is appropriate first to show the correctness of the Board's finding that California Footwear controlled and operated the Venice plant through the agency of Trina.

**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING
THAT CALIFORNIA FOOTWEAR CONTROLLED OPERATIONS
AT THE VENICE PLANT**

Settled law establishes that an employer is responsible for the commission of unfair labor practices arising in a business enterprise whose operations and labor relations he actually controls. The employer may not evade liability by the device of recasting the business as a nominally independent enterprise if he in fact continues to direct its operations. Accordingly, employers have uniformly been held responsible for violations of the Act committed by newly contrived business organizations which in reality are "a disguised continuance of the old employer", *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100, 106; *N.L.R.B. v. Andrews*, 236 F. 2d 44 (C.A. 9).⁸ Common indicia of such "disguised continuance" are financial control over the nominally independent enterprise through advances of operating capital and raw materials,⁹ supervision and direction of produc-

⁸ See also *N.L.R.B. v. McCatron*, 216 F. 2d 212, 214 (C.A. 9), certiorari denied, 348 U.S. 943; *N.L.R.B. v. O'Keefe & Merritt*, 178 F. 2d 445, 449 (C.A. 9); *N.L.R.B. v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *Dickey v. N.L.R.B.*, 217 F. 2d 652, 653 (C.A. 6); *N.L.R.B. v. Dayton Coal & Iron Corp.*, 208 F. 2d 394, 395 (C.A. 6); *N.L.R.B. v. Somerset Classics*, 193 F. 2d 613, 615, certiorari denied, 344 U.S. 816; *N.L.R.B. v. E. C. Brown*, 184 F. 2d 829, 831 (C.A. 2); *Butler Bros. v. N.L.R.B.*, 134 F. 2d 981, 984 (C.A. 7), certiorari denied, 320 U.S. 789; *N.L.R.B. v. Condenser Corp.*, 128 F. 2d 67, 71-72 (C.A. 3). Cf. *N.L.R.B. v. Grower-Shipper Veg. Assoc.*, 122 F. 2d 368, 378 (C.A. 9).

⁹ See *N.L.R.B. v. McCatron*, 216 F. 2d 212, 214 (C.A. 9), certiorari denied 348 U.S. 943; *N.L.R.B. v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *N.L.R.B. v. O'Keefe & Merritt*, 178 F. 2d 445, 448-449 (C.A. 9).

tion,¹⁰ and control over labor relations policies.¹¹ In such circumstances there is a “measure of domination * * * inconsistent with the notion that [the nominally independent enterprise] is really a free agent either in handling the enterprise or dealing with the men employed. *N.L.R.B. v. Long Lake Lumber Co.*, *supra*, n. 8, at p. 364.

Viewed in the light of these settled principles, the record in this case amply supports the Board's finding that California Footwear was in reality the controlling force behind the operation of the Venice plant. As shown in the Statement, pp. 3-8, financially Trina was wholly subject to California Footwear's pleasure; having no independent source of capital, Trina relied on California Footwear for all operating expenses, and in addition had mortgaged its machinery to California Footwear to secure a loan to pay off other business debts. Pricing of the footwear manufactured at Venice was designed to cover costs but not to afford Trina a profit, a circumstance irreconcilable with the contention that Trina was an independent business enterprise. Moreover, Trina's owner, Fellman, received the same salary he had drawn while working as a pattern maker for California Footwear at the Los Angeles plant, and did much of the same work. That Fellman was in no position even to control his own rate of pay is evidenced by his

¹⁰ See *Dickey v. N.L.R.B.*, 217 F. 2d 652, 653 (C.A. 6); *Butler Bros. v. N.L.R.B.*, 134 F. 2d 981, 984 (C.A. 7).

¹¹ See *N.L.R.B. v. McCatron*, *supra*, n. 8; *N.L.R.B. v. Long Lake Lumber Co.*, *supra*, n. 8; *N.L.R.B. v. Condenser Corp.*, 128 F. 2d 67, 72 (C.A. 3).

complaint that Albert Lewis was given an increase which placed his salary above Fellman's. Fellman's position, in short, was simply that of a foreman at the Venice plant who was subject to the control and direction of California Footwear. This is all the more apparent in view of Lewis' and Levitan's participation in hiring, their supervision of production processes, and their general direction of all phases of the business. Indeed, Fellman was able to institute a system of piece rates only upon obtaining Lewis' permission, and then eliminated the system when Lewis found it unsatisfactory.

These considerations together with the manner in which California Footwear utilized the move to the Venice plant to eliminate the Union, as described in the Statement, *supra*,¹² are consistent only with the conclusion that the Venice plant was operated under the control of California Footwear no less than the Los Angeles plant. California Footwear continued to expend all monies required for manufacturing and to receive all profit from sales, and also continued to direct both the processes of production and employment practices. Trina, on the other hand, contributed to the business no more than its name. Plainly, the Board was entitled to look beyond the legal facade erected by California Footwear and to conclude that California Footwear itself must bear responsibility

¹² Note particularly the role Lewis was found by the Board to have played in the discrimination against employees Roark and Piasek, and in carrying on a program designed to restrain the employees from joining the Union (*supra*, pp. 12-17, R. 141).

for the policies and practices followed at the Venice plant.¹³ See *N.L.R.B. v. Andrews*, 236 F.2d 44 (C.A.9).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENTS' QUESTIONING OF EMPLOYEES ABOUT THEIR UNION AFFILIATIONS AND SURVEILLANCE OF EMPLOYEES ATTENDING A UNION MEETING VIOLATED SECTION 8 (a) (1) OF THE ACT

As shown in the Statement, *supra*, pp. 12-14, respondents persistently opposed the unionization of the employees at the Venice plant. Indeed, the pains taken by Lewis to operate the Venice plant under Trina's name and his deception in telling the Union that he was going out of business and had no connection with the Venice plant can be plausibly explained, as the Board found, only upon the premise that Lewis hoped "to utilize the move [to Venice] as an opportunity to get rid of the Union" (R. 135). Supporting this conclusion is the remark of Lewis' son, Albert, to employee Piasek that the business would "move out to another city" if the Union should "catch up with them over here" (R. 233). After the Union began its organizational drive at the Venice plant, respondents' hostility became open, as evidenced by Fellman's anti-union speech to the employees and his repudiation of an earlier promise to recognize the Union upon a showing of pledge and dues cards executed by a majority of the employees (*supra*, pp. 10-13).

¹³ Respondents' attempts before the Board to show that Trina was independent of California Footwear were largely premised upon testimony which was discredited both by the Trial Examiner and the Board. As this Court has had recent occasion to reiterate, "questions of credibility . . . are for the examiner and the Board, not for [the court], to resolve." *N.L.R.B. v. Wagner*, 227 F. 2d 200, 201.

Viewed in this context, the interrogation by respondents of the employees as to their union attitudes and affiliations, described in the Statement, *supra*, pp. 12-13, and found by the Board to constitute unfair labor practices, was plainly coercive and therefore violative of Section 8 (a) (1). Moreover, other conduct by respondents reinforces this conclusion. Thus, after questioning employees Parker and Murray about the Union, Lewis referred to the Union's organizational effort as "some girls in the plant trying to get something started," and added that there were "always a few of those in every plant" (R. 221). Similarly, Lewis told another employee, after asking her whether she had joined the Union, that if she joined she "would be out a lot of money paying the union dues," and referred to the dues solicitor as "only someone who was trying to be smart" (R. 224-225). Fellman also made clear to the employees he questioned that he was displeased by their support for the Union, and on one occasion emphasized to an employee "that the union was no good, that they wouldn't do anything for [the employees], and that the union could close the shop down and then everyone would be out" (*supra*, p. 13).

Respondents' interrogation found to be improper by the Board thus does not stand alone, but rather "form[s] part of an overall pattern whose tendency is to restrain or coerce." *N.L.R.B. v. McCatron*, 216 F. 2d 212, 216 (C.A. 9). It falls, therefore, into the class of anti-union conduct which this Court has consistently condemned. See e.g. *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 904; *N.L.R.B. v. Radcliffe*,

211 F. 2d 309, 314, certiorari denied, 348 U.S. 833; *N.L.R.B. v. Home Dairies Co.*, 211 F. 2d 784; *N.L.R.B. v. Pacific Moulded Products Co.*, 206 F. 2d 409, certiorari denied, 346 U.S. 938.

The separate finding of a violation of Section 8 (a) (1) based on Lewis' surveillance of the employees who attended the Union meeting of April 14, 1953, similarly fits within an established category of unlawful interference with employee rights. The evident object of spying on employees attending union meetings is "to discover what employees [are] active in the union." *N.L.R.B. v. Vermont American Furniture Co.*, 182 F. 2d 842, 843 (C.A. 2). The fact that an employer would invade the privacy of his employees to obtain this information carries a strong suggestion that its acquisition is sought for the purpose of affecting the security of their tenure. Such a purpose is likely to be regarded as more than just a suggestion where, as here, the employer makes his opposition to unionization plain and commits other unfair labor practices to secure its defeat. Accordingly, this and other Courts of Appeals have long adopted the rule that surveillance at places of union meetings is contrary to the Act's guarantee to employees against interference, restraint, and coercion in their organizational affairs.¹⁴

¹⁴ See, e.g., this Court's decision in *N.L.R.B. v. Grower-Shipper Veg. Assoc.*, 122 F. 2d 368, 376; *No. Whittier Heights Citrus Assoc. v. N.L.R.B.*, 109 F.2d 76, 78, certiorari denied 310 U.S. 632.

First Circuit: *N.L.R.B. v. Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 242.

Third Circuit: *N.L.R.B. v. Electric City Dyeing Co.*, 178 F. 2d 980, 981.

Before the Board respondents' defense both to the surveillance and interrogation charges rested on testimony which was discredited by the trial examiner, whose rulings were affirmed by the Board.¹⁵ As stated in the Intermediate Report resolutions of conflicts in testimony were made upon the basis of "apparent keenness of memories, the possibilities of misunderstanding of spoken words, consistency of testimony within itself, consistency of testimony with other testimony and with known facts, disposition of a witness to depart from the truth, his interest or bias, the conduct of the witness while testifying, and many other factors" (R. 72). This Court has made clear that such resolutions are not to be overturned on judicial review on a record such as that in this case.

Fourth Circuit: *N.L.R.B. v. Pacific Mills*, 207 F. 2d 905, 907.

Fifth Circuit: *N.L.R.B. v. Sunnyland Packing Co.*, 211 F. 2d 923, 924.

Sixth Circuit: *Magnavox v. N.L.R.B. v.*, 211 F. 2d 132, 133.

Seventh Circuit: *Donnelly & Sons v. N.L.R.B.*, 156 F. 2d 416, 419, certiorari denied 329 U.S. 810.

Eighth Circuit: *N.L.R.B. v. Hunter Engineering Co.*, 215 F. 2d 916, 918-919.

Tenth Circuit: *N.L.R.B. v. Standard Oil Co.*, 124 F. 2d 895, 908.

District of Columbia Circuit: *Anthony & Sons v. N.L.R.B.*, 163 F. 2d 22, 26-27, certiorari denied 332 U.S. 773.

¹⁵ Thus, with respect to the interrogation Lewis and Fellman either denied or could not remember having asked the questions to which various employees testified (R. 72). With respect to the surveillance incident, Lewis testified that he was waiting with a friend in his automobile for the latter to catch a bus, and that the concurrence of a Union meeting across the street was fortuitous. The trial examiner, however, credited another witness who testified that Lewis was alone in the car, and noting that the bus stop near which Lewis was parked was not the most convenient or likely bus route to the alleged friend's destination, concluded that "Lewis took advantage of the occasion to stop near the union meeting place for the purpose of surveillance" (R. 79).

N.L.R.B. v. Wagner, 227 F. 2d 200, 201, certiorari denied, 351 U.S. 919. See note 13, *supra*.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT RESPONDENTS UNLAWFULLY DISCRIMINATED AGAINST EMPLOYEES ROARK AND PIASEK

1. Employee Roark, as the Board concluded, was refused a job at the Venice plant because Lewis was determined that the Union should not follow California Footwear's move to Venice. Roark was an experienced and competent worker; indeed, before operations began at the Venice plant, she was one of the few California Footwear employees whom Fellman told Lewis he would like to have work for him (*supra*, pp. 14-15). But Roark had also been a Union steward at the Los Angeles location (*ibid.*). And, as we have shown, every step taken by Lewis in connection with the move to Venice was characterized by his desire to operate an unorganized plant at the new location: the subterfuge in establishing Trina as the apparent employer at Venice; the discontinuance of the Union contract at Venice; the interrogation of employees as to their Union affiliation, the surveillance of a Union meeting, and the anti-Union statements at the Venice plant; and the refusal to recognize the Union as representative of the Venice plant employees irrespective of whether a majority of them signed pledge cards (*supra*, pp. 9-14). It is also significant that the only four employees at the Los Angeles plant who were given jobs at the new location immediately dropped their support for the Union after moving to Venice, and were thereafter expelled from membership for nonpayment of dues (*supra*, p. 14). The

transfer to Venice of these four employees thus scarcely shows a willingness to hire Union advocates, as respondents contended before the Board; a more reasonable inference is that Lewis had cause to believe that the membership of these employees was solely attributable to the compulsory membership provision in the contract at the Los Angeles plant,¹⁶ and that they would not continue to support the Union at Venice. Accordingly, viewing respondents' refusal to hire Roark at the Venice plant "in the total context of respondent's conduct . . . which discloses anti-union sentiment expressed in part in a pattern of [unlawful] action" (*N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9)),¹⁷ the record amply supports the Board's conclusion that Lewis influenced Fellman not to hire Roark as part of the effort "to escape . . . the Union" (R. 91, 141).

¹⁶ The Union membership of the new employee at the Venice plant who performed the job which Roark had done at the Los Angeles plant, a factor emphasized by respondents before the Board, also does not militate against the Board's conclusion that Roark was unlawfully discriminated against. The trial examiner found, and his findings in this respect were adopted by the Board, that the new employee's union membership record was limited to a period of time when he had worked under a compulsory membership contract for another employer (R. 86, 87, 89). He had also previously worked as a foreman at a different plant, at which time he was not a union member. Accordingly, as observed by the trial examiner, "respondents would not necessarily think of [him] as a union advocate when employing him" (R. 89).

¹⁷ See also *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 343 (C.A. 9), certiorari denied, 349 U.S. 928; *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 313 (C.A. 9), certiorari denied, 348 U.S. 833; *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 166 (C.A. 9); *N.L.R.B. v. Reeves Rubber Co.*, 153 F. 2d 340, 341 (C.A. 9); *N.L.R.B. v. Bank of America*, 130 F. 2d 624, 627 (C.A. 9, certiorari denied, 318 U.S. 791. Cf. *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 75.

Confirming this finding is the fact that Fellman falsely told Roark on February 5, when she applied at the Venice plant, that there was no work available for her at that time (*supra*, p. 15).¹⁸ "It is well settled that the inferences drawn by the Board are strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny." *N.L.R.B. v. Dant & Russell*, 207 F. 2d 165, 167 (C.A. 9).

In short, the record shows that Roark, an experienced and satisfactory employee, was refused employment without any valid reason having been given her. "Such action on the part of an employer is not natural." *E. Anthony & Sons v. N.L.R.B.*, 163 F. 2d 22, 26 (C.A. D.C.), certiorari denied, 332 U.S. 773. The only reasonable explanation afforded in the record is the one adopted by the Board—that respondents' treatment of Roark constituted a consistent part of the policy of preventing the Union from obtaining employee support at the Venice plant.

2. The Board's finding that respondents discharged employee Piasek because he testified against them in the hearing before the trial examiner, and therefore violated Sections 8 (a) (4) and (3) of the Act, is also

¹⁸ At the hearing before the trial examiner, Fellman did not deny the availability of work for Roark on February 5, but testified that Roark had stated she could not come to work immediately because of a commuting problem. This version of the February 5 incident was rejected by the trial examiner, who credited Roark's testimony that Fellman had told her that she was not then needed but that she would be called when she could be used. The Board's adoption of the trial examiner's resolution of this conflict in testimony should not be overturned, see p. 29, *supra*.

amply supported in the record.¹⁹ Until it became known to respondents that Piasek was prepared to be a witness in the unfair labor practice case against them he worked regularly as a cutter at the Venice plant. On November 10, 1953, however, Piasek appeared at the hearing in this case before the trial examiner, awaiting call to testify for the General Counsel. Lewis' feelings about this occurrence were revealed the following day when he asked Piasek, although the latter had not yet testified, ". . . why do you have to testify against me?" (R. 312). Promptly thereafter, as described *supra*, p. 16, Lewis made an attempt to find another cutter, but the person he called was already employed. Nonetheless, when Piasek reported for work on the day after he had finished his testimony against respondents, as previously instructed by Lewis, he was told that he was not needed, and was never thereafter recalled.

The precipitate nature of the discharge, Piasek's undenied experience and ability as a cutter, Lewis' questioning of Piasek's appearance as a witness in this case, and respondent's established animosity toward the Union which led to the unfair labor practice proceedings in which Piasek testified favorably to the Union, combine to support the Board's conclusion that the discharge is attributable to Piasek's role as a

¹⁹ Section 8 (a) (4) makes it an unfair labor practice for an employer "to discharge . . . an employee because he has . . . given testimony under this Act." A violation of this provision may also fall, as in this case, under the more general prohibition contained in Section 8 (a) (3) against discrimination affecting tenure of employment. *N.L.R.B. v. Knickerbocker Plastic Co.*, 218 F. 2d 917 (C.A. 9).

witness against respondents. Cf. *N.L.R.B. v. Texas Independent Oil*, 232 F. 2d 407, 451 (C.A. 9); *N.L.R.B. v. Martin*, 207 F. 2d 655, 658 (C.A. 9), certiorari denied, 347 U.S. 917; *N.L.R.B. v. Oklahoma Transportation Co.*, 140 F. 2d 509 (C.A. 5).

Before the Board respondents contended that Piasek was terminated in order that the cutting job could be given to Jack Rosenthal, who had earlier worked at the Venice plant and whose dismissal therefrom on April 28, 1953 had been alleged by the complaint in this case to be an unfair labor practice.²⁰ According to respondents, they decided, about the time of Piasek's testimony, that it would be prudent to cut off any further back pay liability toward Rosenthal, which might accrue in the event that his discharge were found to be unlawful, by offering him the cutter's job which Piasek held. The explanation does not withstand analysis. In the first place, respondents had already cut off any possible back pay liability to Rosenthal, by offering him reinstatement in May 1953, only a month after he had been discharged. But even if respondents were not certain about the effect of the May offer of reinstatement, the lengthy delay in waiting from April until November, just after Piasek's unfavorable testimony, before taking this step is suggestive of more than a coincidental connection between the two events. Nonetheless, as the trial examiner observed, no attempt was made to

²⁰ As stated *supra*, p. 19, n. 6, the Board dismissed the allegations in the complaint pertaining to Rosenthal's discharge. The trial examiner, whose findings in this respect were adopted by the Board, concluded that Rosenthal had been discharged because only one cutter was needed, and Piasek, who had also been hired as a cutter, was the more experienced of the two (R. 98-104).

notify, or discuss the matter with, the attorney representing the General Counsel of the Board, even though it was apparent that the action would be viewed with suspicion (R. 115). Finally, Lewis' attempt to replace Piasek with another employee as soon as he found that Piasek intended to testify (*supra*, p. 16) can scarcely be reconciled with the position that Piasek was discharged to make room for Rosenthal. In sum, the Board was fully justified in concluding "that the reasons given by the respondent for the discharge were merely attempts to create a plausible excuse to discharge [Piasek for his] . . . unfavorable testimony at the . . . hearing." *N.L.R.B. v. Knickerbocker Plastic Co.*, 218 F. 2d 917, 920 (C.A. 9).

IV. THE BOARD PROPERLY FOUND THAT RESPONDENTS VIOLATED SECTION 8(a)(5) OF THE ACT BY REFUSING TO DISCUSS WITH THE UNION THE TRANSFER OF EMPLOYEES TO THE VENICE PLANT, BY DISCONTINUING THE EXISTING CONTRACT AND ESTABLISHING NEW TERMS OF EMPLOYMENT, AND BY REFUSING TO RECOGNIZE THE UNION AS THE REPRESENTATIVE OF THE EMPLOYEES AT THE VENICE PLANT

We have shown that the elaborate arrangement by which California Footwear sought to conceal its control of operations at the Venice plant was conceived as a method to eliminate the Union representation which had been established at the Los Angeles plant. To the extent that the transfer of their business to Venice enables respondents to cease dealing with the Union and to disregard the contract which they executed with the Union, the plan succeeds, and, we submit, the objectives of the Act are *pro tanto* nullified. Accordingly, at the heart of the Board's decision and order in this case are the findings that

respondents failed in their duty under Section 8 (a) (5) of the Act to bargain in good faith with the representative of their employees, and the requirement that they recognize and bargain with that representative.

The findings of the Board in this respect begin with California Footwear's refusal to discuss with the Union the transfer of its employees to the Venice plant, and carry through to the subsequent repudiation of the existing contract with the Union, the unilateral imposition of new terms of employment, and the refusal to recognize the Union as the representative of the employees at Venice.

As stated *supra*, p. 9, Union organizer Tutt sought to negotiate the transfer of employees to the Venice plant in January, 1953, as soon as he learned of the projected move. Tutt told Lewis that he "was anxious that as many of the employees of the California plant would be reemployed at the Venice plant as was possible" (R. 194). Lewis refused to discuss the matter on the ground that California Footwear "had nothing to do whatsoever with the hiring or running of the Venice plant . . ." (R. 193-195). However, as shown *supra*, pp. 3-8, 23-25, the Venice plant in fact was nothing more than a new location for the continuance of business by California Footwear. Accordingly, the single question respecting respondents' conceded refusal to discuss the transfer of employees to the Venice plant is whether the Act imposes an obligation on an employer to discuss this matter on request of his employees' representative when the employer relocates and continues to operate

the same business at a new site. The Act permits no doubt that such an obligation exists. Relocation of a business plainly affects, indeed threatens the continuance of, employees' tenure and conditions of employment, with respect to which the Act commands good faith negotiation. Sections 8 (a) (5), 8 (d) and 9 (a) of the Act. *N.L.R.B. v. Taylor Mfg. Co.*, 222 F. 2d 719 (C.A. 5), enforcing 109 NLRB 1045, 1048; *N.L.R.B. v. Gerity Whitaker Co.*, 137 F. 2d 198 (C.A. 6), certiorari denied, 318 U.S. 763, enforcing 33 NLRB 393; see *Inland Steel Co. v. N.L.R.B.*, 170 F. 2d 247, 252 (C.A. 7), certiorari denied, 336 U.S. 960. California Footwear's dereliction in this respect thus stands as a plain violation of Section 8 (a) (5) of the Act, as the Board unanimously found (R. 133, 147-148).

In view of the unlawful refusal to negotiate with the Union concerning the transfer of its employees to the Venice plant, respondents, we submit, were not entitled thereafter to terminate recognition of the Union on the ground that the Union could not show that a majority of the employees at Venice had designated it as their representative. For it is settled law that a loss of majority employee support does not invalidate a certification where such loss may reasonably be attributed to an employer's preceding refusal to bargain with the representative. This principle has been most frequently applied in cases where either defection from membership of existing employees or the failure of new employees to join a union, thus resulting in the union's loss of majority support, has

followed the commission of unfair labor practices by the employer. See, e.g. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, 102; *Franks Bros. v. N.L.R.B.*, 321 U.S. 702, 705; *N.L.R.B. v. Idaho Egg Producers*, 229 F. 2d 821, 823 (C.A. 9); *N.L.R.B. v. Geigy Co.*, 211 F. 2d 553, 558 (C.A. 9), certiorari denied, 348 U.S. 821; *N.L.R.B. v. Carlton Wood Products*, 201 F. 2d 863, 867 (C.A. 9); cf. *N.L.R.B. v. Warren Co.*, 350 U.S. 107, 110; *N.L.R.B. v. Shannon & Simpson Casket Co.*, 229 F. 2d 652 (C.A. 9). As stated by this Court, "the theory of these cases is that it is reasonable to assume that in the presence of unfair labor practices a decline in employee support does not reflect an untrammelled expression of the employees' will, and that the unfair labor practices must be purged before the representation question can be accurately determined." *N.L.R.B. v. Andrew Jergens Co.*, 175 F. 2d 130, 139 (C.A. 9), certiorari denied, 338 U.S. 827. Moreover, the validity of a bargaining order in such cases is not impaired by the fact "that some losses may be motivated by other factors" where it is "impossible to disentangle them so long as the refusal to bargain stands." *Ibid.* Cf. *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 515-516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

The same principle controls here.²¹ Had the em-

²¹ It is immaterial under this principle that the reasons which prompted California Footwear to relocate in Venice were unconnected with unionism. For as the cases cited in the text make clear, it is enough to support the requirement of continued recognition of a union that its inability to establish its majority follows an employer's unfair labor practices to which the loss of majority might reasonably be attributed.

ployees at the Los Angeles plant transferred to the new location, presumably there would have been no dilution in employee support for the Union. Although it cannot be known with certainty whether such a transfer of employees would have resulted from negotiations between California Footwear and the Union, the Board could reasonably conclude that but for California Footwear's unlawful refusal to negotiate, an agreement might have been reached by which substantially the same work force would have been maintained at Venice as existed at the Los Angeles plant. As the Board observed, the fifteen mile distance between the two plants, both of which lie within the Los Angeles metropolitan area, did not place the Venice plant "beyond the normal commuting practices in such metropolitan area" (R. 138). Indeed, it is likely that many of the employees lived closer to the Venice location than that distance. Also reflecting the likelihood that at least a substantial number of the Los Angeles employees would have welcomed job opportunities at the Venice plant is the letter written to respondents by the Union requesting such employment on behalf of "all of the employees engaged at the old job" (R. 349). It is noteworthy in this respect that the several Los Angeles employees who applied or were offered jobs at Venice were willing to commute to the new location. Also of significance is the fact that California Footwear implemented its plan to get rid of the Union by disavowing any control over the Venice plant and by refusing to discuss the transfer of employees to it; respondents might well have feared that negotiations on this matter might result in

staffing the new plant with the same Union members it had employed in Los Angeles.²²

From the foregoing it seems clear that there was a reasonable possibility that except for California Footwear's unlawful refusal to bargain the Union would have retained its majority at the Venice plant by a transfer of old employees. And as the authorities cited, *supra*, p. 38, establish, no more than such a reasonable possibility is necessary to warrant the requirement, contained in the Board's order in this case, that the Union continue to be recognized as the representative of the employees.

It follows from what has just been shown—that respondents' refusal to recognize the Union after the relocation of the business in Venice was unlawful—that the further steps taken by respondents in terminating the existing contract with the Union and establishing new conditions of employment were also unlawful. Thus, respondents' unilateral imposition of working conditions, with neither notice to nor discussion with the Union, is directly contrary to the Act's injunction that such matters be negotiated be-

²² The considerations discussed in the text distinguish the instant case from the Board's decision in *Brown Truck & Trailer Mfg. Co.*, 106 NLRB 999, where a loss of majority support for the union upon removal of the plant to a new location and the hiring of new employees was held to excuse the employer from continuing to recognize the union as the representative of his employees, even though he had failed to discuss with the union the transfer of old employees to the new location. Thus, the greater distance between the new and old plants in the *Brown* case, along with the absence of any indication that the employees wished to be transferred, "raised serious doubts that a majority of employees would have transferred to the new plant even if the [employer] here had bargained in regard to transfers" (R. 138).

tween employer and employee representative. See e.g., *N.L.R.B. v. Crompton-Highland Mills*, 337 U.S. 217, 223; *May Department Stores v. N.L.R.B.*, 326 U.S. 376, 384; *N.L.R.B. v. Shannon & Simpson Cas-ket Co.*, 208 F. 2d 545, 548 (C.A. 9).

Similarly, as the Board found, respondents' refusal to apply the existing contract with the Union at the Venice plant was in violation of the good faith bargaining requirements contained in Section 8 (d) of the Act. Thus, Section 8 (d) in applicable part provides that "where there is in effect a collective bargaining contract . . . no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification [complies with specified notice and negotiation requirements]." Respondents made no effort to comply with any of the requirements made prerequisite to contract termination by Section 8 (d), but simply refused to continue the existing contract when production began at the Venice plant, even though that contract by its terms had many months to run.²³ In view of the established facts that California Footwear, a party to the contract, remained as the real employer at the Venice plant, that the Union remained representative of the employees at the Venice plant, and that the nature of the work and circumstances under which it was performed remained the same after the move to Venice, there can be little doubt that the existing contract remained "in effect" throughout the events in

²³ Manufacturing at the Venice plant began on a small scale in December, 1952. The contract between California Footwear and the Union was not terminable until September 30, 1953 (R. 352).

this case, thereby subjecting respondents to the provisions in Section 8 (d) which they failed to observe. Nothing in the contract itself suggests otherwise. The parties there expressed their intent that its provisions should continue in effect until September 30, 1953, and in view of the continuity in relationship between the parties and in the business carried on, there is no reason to suppose that a change in location within the same metropolitan area would require an interruption of the stability which the contract purported to achieve. Cf. *McQuay-Norris Mfg. Co.*, 15 LRRM 1703 (W.L.B.) Moreover, as the Board pointed out (R. 139-140) the contract in this case would bar a rival union from obtaining a representation election during its term, notwithstanding the relocation of the business in Venice. Thus, under the Board's "contract-bar" policy, which operates to immunize industrial relationships from disruptive challenges by competing unions during the period in which conditions have been stabilized by a valid contract, California Footwear's move to Venice did not warrant a break in the continuity of its relationship with the Union which would be sufficient to throw open the question of employee representation until the expiration of the existing contract.²⁴

In sum, respondents were no less duty bound to

²⁴ The Board's contract-bar rules, in general, have been approved by this and other courts of appeals. *Iob v. Los Angeles Brewing Co.*, 183 F. 2d 398, 404 (C.A. 9); *N.L.R.B. v. Efco Mfg. Co.*, 203 F. 2d 458, 459 (C.A. 1); *N.L.R.B. v. Geraldine Novelty Co.*, 173 F. 2d 14, 17, 18 (C.A. 2); *N.L.R.B. v. Public Service Transport*, 177 F. 2d 119, 124 (C.A. 3); *Kearney & Trecker v. N.L.R.B.*, 210 F. 2d 852, 857 (C.A. 7), certiorari denied, 348 U.S. 824.

observe the terms of the existing contract at the Venice plant than to recognize the Union as the continuing representative of respondents' employees. These parallel requirements are plainly appropriate to accomplishing the proper objective of restoring the "conditions at the Respondents' plant . . . as nearly as possible to those which would have existed in the absence of the Respondents' unfair labor practices." (R. 140). See *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 82.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's order be enforced in full.

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December, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

DEFINITIONS

* * * * *

Sec. 2. When used in this Act— * * *

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . .

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

“(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

“(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

“(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

“(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

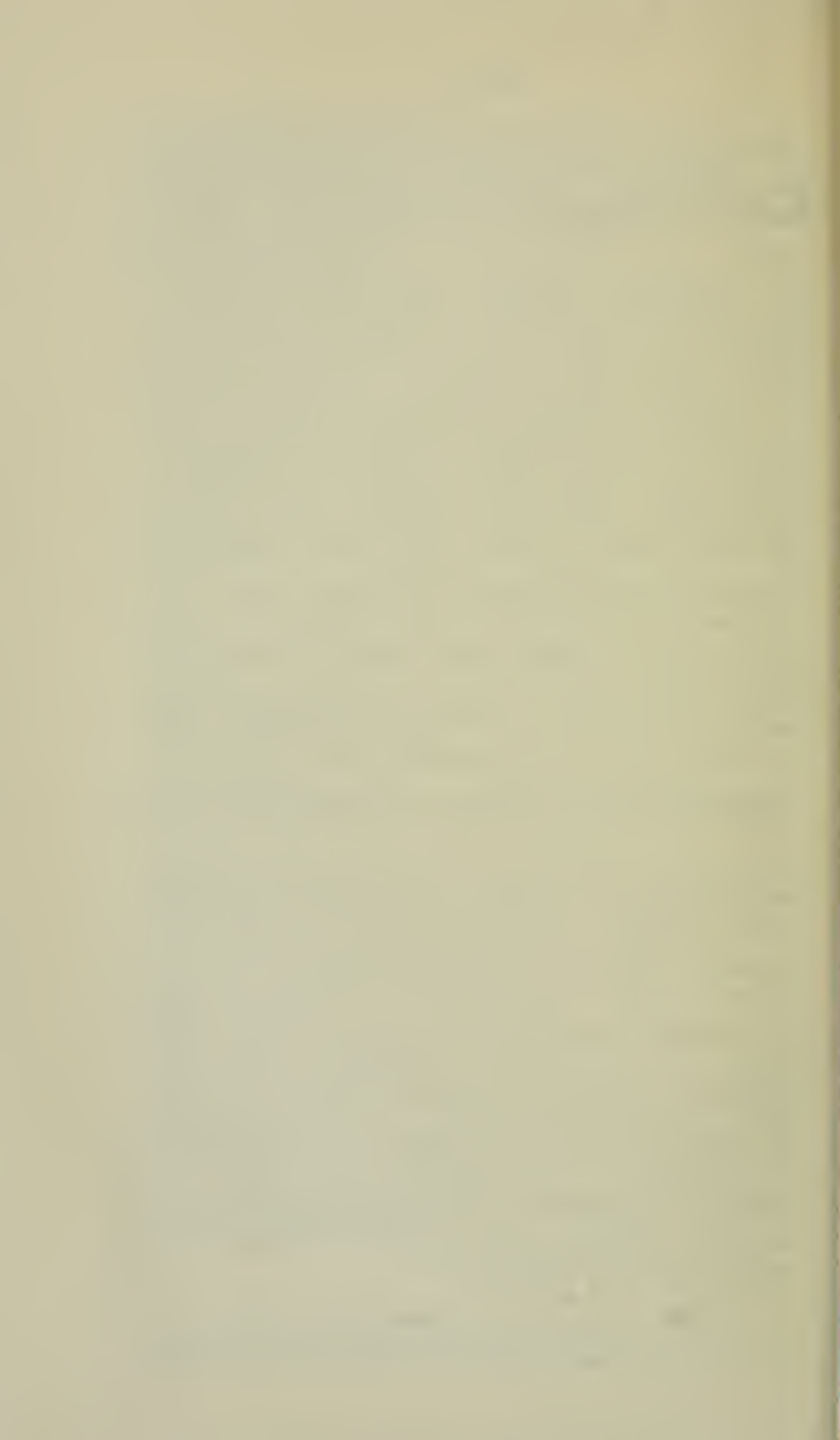
PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act;
* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (in-

cluding the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order; and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *



No. 15169
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner and Cross-Respondent,
vs.

JACK LEWIS and JOE LEVITAN dba CALIFORNIA FOOT-
WEAR COMPANY, and TRINA SHOE COMPANY,
Respondents and Cross-Petitioners.

On Petition for Enforcement of, and Petition to Set Aside,
an Order of the National Labor Relations Board.

**BRIEF FOR RESPONDENTS AND CROSS-
PETITIONERS.**

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FILED

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Summary of argument.....	4
Argument	5

I.

The order directing respondents to bargain with the Union as exclusive representative of employees is not supported by substantial evidence on the record considered as a whole.....	5
--	---

II.

The order directing respondents to bargain with the Union is unlawful because it would have the effect of conferring privileged status on a labor organization assisted by means of compulsory union membership contract provisions which constituted an unfair labor practice denounced by the Act....	10
---	----

III.

The order directing respondents to bargain with the Union is arbitrary and capricious and would deny respondents due process of law because it would unfairly discriminate against them in comparison with other employers, who are not required to continue recognition of a labor organization after it loses majority status in consequence of a plant removal for economic reasons.....	11
---	----

IV.

The order to pay back to Roark is not supported by substantial evidence on the record considered as a whole.....	12
--	----

V.

The order to reinstate Piasek with back pay is not supported by substantial evidence on the record considered as a whole, is arbitrary and capricious and constitutes denial of due process of law..... 15

Conclusion 22

Appendices:

Appendix A. Relevant statutory provisions.....App. p. 1

Appendix B. Excerpts from brief for the National Labor Relations Board in National Labor Relations Board v. L. Ronney & Sons Furniture Mfg. Co. (C. A. 9), No. 13315, 206 F. 2d 730.....App. p. 3

TABLE OF AUTHORITIES CITED

CASES	PAGE
National Labor Relations Board v. L. Ronney & Sons Furniture Mfg. Co., 206 F. 2d 730, cert. den. 346 U. S. 937.....	7, 10, 18
STATUTES	
Administrative Procedure Act, Sec. 10(e).....	3, 11
Labor-Management Relations Act of 1947 (61 Stats. 136):	
Sec. 8(a)(3)	7, 10
Sec. 9	6
Sec. 9(a)	9
Sec. 10(e)	1
Sec. 301(a)	9
United States Code Annotated, Title 5, Sec. 1010(e).....	3
United States Code, Title 29, Supp. V, Secs. 151 et seq.....	1
United States Constitution, Fifth Amendment.....	11

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BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS.

Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order, as stated in the Board's brief (p. 1) and also upon the respondents' cross-petition to set the order aside. [R. 374.]¹ By virtue of Section 10(e) of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151 *et seq.*), hereinafter referred to as

¹"R." designates the printed record herein.

“the Act,”² this Court has jurisdiction to set aside the Board’s order in whole or in part. As stated in the Board’s brief, no jurisdictional issue is presented.

Statement of the Case.

Following the customary procedure, in which the Board resolved almost all evidentiary conflicts in favor of its own witnesses, the Board made an order which would require respondents to bargain collectively with United Shoe Workers of America, Local 122, C.I.O., hereinafter called the Union, to offer reinstatement to one Piasek, to pay back pay to him and another, Roark, and to cease and desist generally from committing alleged unfair labor practices. [R. 142-145.] The Board’s Acting Chairman dissented from the order to bargain with the Union and the back pay order as to Roark. [R. 146-157.]

The Board’s order was made on the basis of a Trial Examiner’s findings [R. 27-122] as adopted and modified by the Board. [R. 131-142.]

While the respondents do not concede and in fact deny the accuracy of the Board’s findings, for practical reasons respondents here contest only those portions of the Board’s order which are of current importance to them. Respondents offered reinstatement to Piasek, who declined it, and respondents are willing to post a proper cease-and-desist notice. What is left is the Piasek and Roark back pay order and the order to bargain with the Union.

The Board found that respondent Trina Shoe Company, a corporation, acted as the *alter ego* of respondent

²Certain relevant portions of the Act are set forth in the appendix to the Board’s brief, others in Appendix A to this brief.

California Footwear Company, a partnership, although they had different ownership [R. 33-34] and Trina is shown to have had an independent existence both before and after its business relationship with California. [R. 34, 120.] Respondents concede that there is some evidence which, if believed, would support the Board's *alter ego* finding, and respondents do not contest it.³

In general, respondents contend that the order to bargain and the Piasek and Roark back pay orders and the findings upon which they are based are not supported by substantial evidence on the record considered as a whole, and hence should be set aside under Section 10(e) of the Act.

In addition, respondents contend: (1) that the order to bargain is unauthorized under the Act because it would in effect preserve to the Union a privileged status as collective bargaining representative, which status the Union attained or kept with the assistance of unfair labor practices for which other employers and unions are prosecuted; (2) that by the order to bargain the respondents here were subjected to unfairly discriminatory treatment in comparison with other employers, whereby the order was arbitrary and capricious within the meaning of Section 10(e) of the Administrative Procedure Act⁴ and denied these respondents due process of law; and (3) that the findings of discrimination as to Piasek and the order to pay him back pay was likewise arbitrary and capricious and a denial of due process.

³Respondents do not, however, concede the occurrence of the supposed conversations which the Trial Examiner imagined [R. 43, 88] to have taken place between Lewis, a partner in California, and Fellman, an officer of Trina, to justify a finding of discrimination against Roark.

⁴5 U. S. C. A., Sec. 1010(e): Appendix A to this brief.

Summary of Argument.

I. The order directing respondents to bargain with the Union as exclusive representative of employees is not supported by substantial evidence on the record considered as a whole.

II. The order directing respondents to bargain with the Union is unlawful because it would have the effect of conferring privileged status on a labor organization unlawfully assisted by means of compulsory union membership contract provisions which constituted an unfair labor practice denounced by the Act.

III. The order directing respondents to bargain with the Union is arbitrary and capricious and would deny respondents due process of law because it would unfairly discriminate against them in comparison with other employers, who are not required to continue recognition of a labor organization after it loses majority status in consequence of a plant removal dictated by economic considerations.

IV. The order to pay back pay to Roark is not supported by substantial evidence on the record considered as a whole.

V. The order to reinstate Piasek with back pay is not supported by substantial evidence on the record considered as a whole, is arbitrary and capricious, and constitutes denial of due process of law.

ARGUMENT.

I.

The Order Directing Respondents to Bargain With the Union as Exclusive Representative of Employees Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

Prior to a date early in 1953⁵ California conducted manufacturing operations at a plant on Los Angeles Street in the City of Los Angeles. [R. 33, 58.] On August 20, 1951, the Board certified the Union as collective bargaining representative of California's employees. On September 27, 1952, California entered into a contract with the Union effective for one year from October 1, 1952, and renewable annually in default of notice to terminate it. [R. 32-33.]

As the Trial Examiner found [R. 35]:

“California's Los Angeles lease was due to expire in February, 1953. Its lessor, who was asking an increase in rent from \$288, to about \$342 per month, turned down Lewis' offer of \$300. Because of this and because of poor health and advice of his doctor to ‘take it easy’ as much as possible, Lewis, who lived in Santa Monica, decided to locate the plant closer to his home.”

Late in November, 1952, California leased premises in Venice, California,⁶ for a term to begin January 1, 1953; thereafter California subleased a portion of the new location to Trina for manufacturing purposes and retained

⁵The record does not show the exact date on which California's Los Angeles operations ceased. [R. 58.]

⁶Venice is now a portion of the City of Los Angeles, being about 15 miles across town from Los Angeles Street. [R. 138.]

the rest for its own merchandising operations. [R. 35-37.] The Board's findings concede that the plant was moved "for economic reasons." [R. 135.]

Trina began manufacturing operations at the Venice plant early in 1953. Some of the employees hired there had formerly worked at California's Los Angeles plant; others had not.

In order to qualify as exclusive bargaining representative and hence to be beneficiary of a Board order to bargain, a labor organization must have been designated as such representative by a majority of the employees in an appropriate collective bargaining unit under Section 9 of the Act. The Board's General Counsel tried, but failed, to prove that the Union had a majority of the employees at the Venice plant [R. 60-66, esp. p. 66, n. 22] and the Board's findings concede that when the plant was removed from Los Angeles to Venice the Union suffered a "loss of majority status." [R. 139.]

The Board assumes that the Union had a valid majority at the time the Los Angeles plant shut down and finds that unlawful refusals to bargain occurred, first, in connection with the shutdown and removal of the Los Angeles plant, and later in connection with the Venice manufacturing operations. The Board attributes the Union's lack of majority status in the Venice plant to unfair labor practices. [R. 136-139.] Both the Board's basic assumption and its findings lack substantial support in the evidence.

In the Los Angeles plant the Union was the beneficiary of a contract which illegally imposed compulsory Union membership on employees. [R. 68-69; Sec. 8(a)(3) of the Act.] At least four of the employees are shown to have dropped out of the Union after this restraint was removed. [R. 86.] The record does not show what happened to the others, although it may be assumed that Roark and Rosenthal, who testified for the Union and in support of their back pay claims, remained under Union discipline.

Since the Union's majority status in the Los Angeles plant was maintained by illegal compulsory union membership contract provisions, it is doubtful whether even in that plant the Union was entitled to continued recognition. According to a principle which the Board has successfully urged upon this Court, once a labor organization has benefited by such illegal assistance the employer is bound to withdraw recognition from it and cease dealing with it until it has been able to re-establish its majority status by legitimate means. See *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), 206 F. 2d 730, 734, cert. den. 346 U. S. 937.

So far as operations at the Los Angeles plant are concerned, the Board's finding of refusal to bargain boils down to the complaint that California refused to discuss with the Union the transfer of employees to the Venice plant. (Bd. Br. pp. 9-10.) The evidence which Board counsel cite in support of that is to the effect that a Union official, Tutt, visited the Los Angeles plant in January, 1953, and spoke to Lewis, who confirmed the reported

plan of closing the Los Angeles plant and informed him that Fellman, president of Trina and formerly an employee of California, was going to operate a new plant in Venice. Tutt mentioned his desire to have as many employees of the Los Angeles plant as possible re-employed at Venice, whereupon Lewis said he had nothing to do with that and referred Tutt to Fellman. [R. 193-195, 265-266.] So far as the record discloses, Tutt never did take the matter up with Fellman; although they met several times in the first few months of 1953 the topic was always that of Union contract and Union recognition [R. 195-206]; meanwhile Fellman had hired several former employees of the Los Angeles plant. [R. 86.]

Lewis' refusal to discuss the transfer of employees to Venice and his referral of the inquiry to Fellman did not constitute a refusal to bargain. Whether Trina is considered an independent enterprise or the *alter ego* of California, Fellman was authorized to and did hire employees for the Venice plant; he was certainly authorized to discuss the matter. In collective bargaining both sides are entitled to select their own representatives and neither side has the right to choose who shall negotiate for the other. There is nothing to the assertion that a refusal to bargain occurred when Lewis referred the Union official to Fellman at the Venice plant.

There was, of course, a refusal to bargain with the Union as exclusive representative of employees of the Venice plant after it opened. There, however, the Union never attained majority status. The Board assumes that

but for the alleged refusal to bargain which it found to have occurred at the Los Angeles plant, enough employees would have transferred from Los Angeles to Venice to provide the Union with majority status at the latter location. [R. 139.] Such an assumption would be implausible at best. Here, however, there was no refusal to bargain in connection with the closing of the Los Angeles plant, so that the whole foundation of the Board's argument is lacking.

As applied to the Venice plant the Board's order to bargain would require the employer to deal exclusively with a minority labor organization as exclusive representative of employees. That order would not effectuate, but would rather frustrate, the Act's majority rule principle: Section 9(a).

The Board argues that California's labor contract of September 27, 1952, remained in effect and was applicable to Venice plant operations so as to entitle the Union to continued recognition there. But the Board does not have jurisdiction to adjudicate contract rights, the determination which is confided to the courts⁷ and could not be referred to an administrative agency in view of the Seventh Amendment guarantee of trial by jury. In any event, the contract illegally assisted the Union, for reasons which are more fully discussed below, and respondents' failure to accord continued recognition to the Union thereunder cannot be found an unfair labor practice.

⁷Section 301(a) of the Act.

II.

The Order Directing Respondents to Bargain With the Union Is Unlawful Because It Would Have the Effect of Conferring Privileged Status on a Labor Organization Assisted by Means of Compulsory Union Membership Contract Provisions Which Constituted an Unfair Labor Practice Denounced by the Act.

The labor contract between California and the Union required employees to become Union members within 30 days after hiring and required newly hired inexperienced workers to get work permits from the Union within two weeks of their employment. [R. 68.] These provisions were illegal under Section 8(a)(3) of the Act. On this point respondents' counsel cannot improve upon the argument which Board counsel successfully urged against him in this Court in another case: *N.L.R.B. v. L. Ronney & Sons Furniture Manufacturing Co.* (C. A. 9), 206 F. 2d 730, cert. den. 346 U. S. 947. Accordingly, appropriate excerpts from the Board's brief in the *Ronney* case are set forth in Appendix B of this brief.

In the *Ronney* case the mere execution of such a contract was deemed such a grave offense that the contracting union was disqualified to serve as employees' bargaining representative until such time as it had won an election to establish its right to represent employees. In the instant case, however, respondents were denounced for abandoning such a contract and ordered to bargain with the union which benefited by it.

The Board's power under the law is broad, but it is not authorized to exempt a privileged labor organization from the requirements of the statute or to make an order which will perpetuate the coercive effect of illegal compulsory union membership contract provisions.

III.

The Order Directing Respondents to Bargain With the Union Is Arbitrary and Capricious and Would Deny Respondents Due Process of Law Because it Would Unfairly Discriminate Against Them in Comparison With Other Employers, Who Are Not Required to Continue Recognition of a Labor Organization After It Loses Majority Status in Consequence of a Plant Removal for Economic Reasons.

As the dissent of the Board's Acting Chairman pointed out, in making its bargaining order in this case the majority of the Board departed from the rule established in a North Carolina case⁸ and were "establishing a different rule for employers in California." [R. 152.] The majority in the instant case attempted without success to distinguish the North Carolina case. [R. 137-139, 148-152.]

National uniformity of our fundamental labor relations law is universally recognized as desirable and indeed is the manifest purpose of the federal Act. To accord different treatment to similarly situated employers in different parts of the country is arbitrary and capricious administrative action which should be set aside under Section 10(e) of the Administrative Procedure Act and the Fifth Amendment.

⁸*Matter of Brown Truck and Trailer Mfg. Co.*, 106 N.L.R.B. 999.

IV.

The Order to Pay Back Pay to Roark Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

The Board ordered respondents to pay back pay to Blanche Roark on the theory that she was discriminated against “both at the time of her employment at the Los Angeles plant was terminated and on February 5, 1953, when she was denied employment at the Venice plant.” [R. 140-141.]

It was not found “that the termination of Roark’s employment at the Los Angeles plant was itself discriminatory”; rather, it was found “that discrimination occurred at that time when Roark, for discriminatory reasons, was not offered a continuation of employment at the new plant.” [R. 141.] The Board adopted the Trial Examiner’s finding “that Roark was one of a group of five employees that Fellman told Lewis he would like to have at the Venice plant if available, and *that if he had not been adversely influenced by Lewis he would have made arrangements to take her to Venice.*” [R. 141.] (Emphasis supplied.) But there is not a scintilla of evidence in the record to support the above italicized portion of the Board’s findings, which is more speculation and surmise. The Board’s brief (p. 31) repeats the same assertion but cites no evidence to support it; the only record references given [R. 91, 141] are to the Trial Examiner’s report and the Board’s decision.

Fellman gave the only testimony concerning any discussion between himself and Lewis on the subject of the transfer of employees from Los Angeles to Venice. He remarked to Lewis that there were certain employees at the Los Angeles plant “who, if they could be available, I

would like to have out there at Venice.” [R. 292.] Fellman mentioned Roark, Morris, Quesenberry, Hernandez, and Estrada. [R. 292-293.] Fellman did not recall any response on the part of Lewis. [R. 293.] Of the five mentioned, Fellman invited only Quesenberry and “probably” Hernandez to go to Venice. [R. 86.] Estrada was not invited but did go to work at Venice. [R. 86.]

From the foregoing it appears that although Fellman mentioned five employees as prospects for transfer he did not invite more than two of them. His failure to invite Roark did not single her out for special treatment. And Fellman’s failure to invite an employee to come to Venice did not indicate any determination on his part to discriminate against the employee, for although Estrada was not specially invited he was hired when he applied for work at Venice. Lewis is not shown to have had anything to do with Fellman’s decision whether or not to invite employees to Venice or whether or not to hire them if they showed up without invitation. Thus the Board’s finding of discrimination against Roark in failing to invite her to Venice is without foundation.

The finding of discrimination in failing to hire Roark when she applied at the Venice plant is likewise unsupported by substantial evidence. Roark’s last job at the Los Angeles plant was that of platform stitcher. [R. 84.] On February 5, 1953, she applied to Fellman at the Venice plant for work as a platform stitcher. [R. 156.] Oster, chief Union shop steward at the Venice plant [R. 206] and another employee, Murray, were then sharing whatever platform stitching was needed and they did other work as well; there was never enough platform stitching to require the services of more than one employee. [R. 87.]

As Acting Chairman's dissent noted, "for Roark to have been employed as a platform stitcher, the Respondent would have had to displace Oster or Murray, or both of them . . . certainly the law does not require the Respondent, in order to avoid a charge of anti-union discrimination, to transfer incumbent employees to less favorable positions in order to accommodate prounion applicants . . . the Respondent's position in this regard was both reasonable and sound. The Board has no right to substitute its concept of business management for that of the employer." [R. 156-157.]

The Board asserts that work was available when Roark applied. [Bd. Br. 15, R. 142.] That finding is based on a portion of Fellman's testimony [R. 85, 294] although the Trial Examiner and the Board believed Roark's conflicting version [R. 85, 132-133.] Fellman testified that he offered Roark a job, intending to use her to replace Murray or Oster, but that she was not then ready to go to work and that by the time she again inquired Oster had been given the only full-time job as platform stitcher. [R. 85, 87.] The only work which was "available" when Roark applied was work which was then being done by Oster or Murray. As stated above, respondents had no obligation to displace either of them to provide a job for Roark. Fellman testified that he offered Roark a job but that she was not ready to take it [R. 85]; Roark testified that he put her off, promised to telephone her, and then failed to do so. [R. 84.] It does not matter which version is believed, for in any event respondents were not obliged to displace anyone then working in order to provide employment for Roark. Their failure to do so was not discriminatory.

V.

The Order to Reinstate Piasek With Back Pay Is Not Supported by Substantial Evidence on the Record Considered as a Whole, Is Arbitrary and Capricious and Constitutes Denial of Due Process of Law.

The order to reinstate Piasek with back pay is based on the finding that respondents unlawfully discriminated against him by discharging him November 17, 1953. [R. 116.] There is no evidence of any discharge of Piasek on that or any other date.

Piasek was hired at the Venice plant as a cutter on April 6, 1953. [R. 104-105.] At that time the Venice plant had another cutter, Rosenthal, who had previously worked at the Los Angeles plant and was a member of the Union. [R. 98-99.] Rosenthal was laid off April 28, 1953.

The hearing before the Board's Trial Examiner began October 13, 1953, on the basis of an amended consolidated complaint which alleged among other things that on April 28, 1953, "Respondents, and each of them, discriminatorily discharged" Rosenthal "to discourage membership in the Union" and that by that and other acts "Respondents, and each of them, did engage in and *are engaging in* unfair labor practices within the meaning of Section 8(a)(3) of the Act." [R. 6-7.] (Emphasis supplied.) If the Board has found the allegations of its complaint to be true with respect to Rosenthal it would no doubt have ordered respondents to reinstate Rosenthal with back pay, for that is the conventional remedy prescribed in such cases. Respondents denied the essential allegations of the complaint [R. 9-14], and the proceeding went to trial on the issues so joined.

During the presentation of the Board's case its General Counsel adduced evidence on the basis of which he argued that Rosenthal had been the victim of unlawful discrimination when he was laid off April 28, 1953, and Piasek was retained. [R. 98-103.] After the prosecution rested, respondents moved to dismiss the complaint with respect to Rosenthal for lack of substantial evidence. The General Counsel opposed the motion and it was denied; the Trial Examiner indicated his belief that a *prima facie* case had been made out as to Rosenthal. [R. 29, 247-253.] (When the Trial Examiner issued his intermediate report and recommended decision April 28, 1954, he recommended dismissal of the complaint as to Rosenthal [R. 126], but of course respondents had no way of knowing in November 1953 that that would happen.)

Respondents' defense to the complaint of discrimination against Rosenthal embraced two contentions. In the first place, respondents contended that although junior to Rosenthal in point of seniority, Piasek was retained because he was more experienced in cutting leather, which the plant sometimes used in addition to plastics, felt, and compositions. [R. 99-103.] Secondarily, respondents contended that even if Rosenthal were found to have suffered discrimination April 28, 1953, any obligation on their part to reinstate him and pay him back pay was cut off when he refused an offer of reinstatement about a month later.

At the instance of the General Counsel, Rosenthal testified on direct examination that about a month after his layoff he received a telegram asking him to come back to work and that he was working on something else at the time but that he went to the plant and told Lewis and Fellman "that I was tied up right now and I would know

in two or three days whether I would come back to work, and if they could use me at that time, if this deal that I was working on did not materialize, I would go back to work.” Rosenthal further testified: “Three days later I did come back and said that my deal fell through and I wanted to go back to work. Mr. Fellman told me at that time that there was no work, that they needed me three or four days ago but not now.” [R. 241-242.]

Despite this testimony, the General Counsel did not then concede that Rosenthal’s right to reinstatement and continuing back pay was cut off by the offer which was made him.⁹ Although respondents believed that their offer to Rosenthal should relieve them of further responsibility to him they had no reason to suppose that the prosecution agreed with them. (They contended that they had made an offer to Roark in February 1953 [R. 84-85] but they were ordered to pay her back pay to November of that year). [R. 120.] The General Counsel questioned the good faith of the offer to Rosenthal, complaining that it was made merely to stop the running of back pay. [R. 104, 249.] In a colloquy with counsel November 23, 1953, the Trial Examiner tentatively hazarded the view that “once an offer is made to reinstate, as it was in this case, that may be argued to be a complete exculpation and that even though there might have been a job for such a person, the respondent might, *perhaps justifiably*, refuse to offer to Rosenthal, who previously refused to accept or had not accepted, at least.” (Emphasis supplied.) [R. 248.] The Trial Examiner cautioned

⁹The concession was not forthcoming until December 4, 1953, and was evidently made then in order to support a new charge of discrimination against Piasek. [R. 364-365.]

counsel "That is a matter, however, that I am not prepared to answer at the present time. I am not sure what that cases may show on that." [R. 249.] The Trial Examiner asked Board counsel if he had any cases on the subject and received reply "Well, no, I would consider that a factual problem . . ." [R. 249.] Later, the Trial Examiner pointed out that even after the offer to Rosenthal, "a new unfair labor practice might have arisen if the Respondents, having work for him, discriminatorily refused him employment a few days later when he offered his services." [R. 113.] The Trial Examiner correctly found that "Respondents' counsel had, before December 4, 1953, some reason to believe that the General Counsel was not conceding that Rosenthal's right to reinstatement was cut off in May, 1953." [R. 112.]

Respondent's counsel had reason to fear that what appeared to be a refusal of an offer of reinstatement might be viewed otherwise by the Board. In *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), 206 F. 2d 730, 737-738, the employer, represented in this Court by the same counsel, was ordered by the Board to reinstate an employee (Sendejas) and pay him back pay for a period long after he had refused an offer of reinstatement; this Court set aside that portion of the order.

Thus it was that in November 1953 respondents were defending against a prosecution which charged them with discrimination against Rosenthal in favor of Piasek. Piasek worked at the Venice plant intermittently from April 3 to November 4, 1953. [R. 104-106.] He was laid off on November 5 and 6 but was told to report back for work on November 9 and, so far as the record discloses, he may have done so. [R. 117.] Piasek sat around

the hearing room November 10, 11 and 13, and then testified November 16. (He was supposedly waiting all that while to be called as a witness for the prosecution [R. 107-109] but he was probably an interested spectator as well, for it is unlikely that the Government would be so wasteful of the time of a man who wanted to work.) On November 13, Lewis asked Piasek if he would be able to start cutting on Monday the 16th. Piasek replied that he would if he were called to testify that day (Friday) but otherwise he would start working on Tuesday. Lewis knew on November 13, when he asked Piasek to come back to work, that Piasek planned to testify against respondents [R. 108.]

Until November 23 the Venice plant did no cutting, except for what one Zell may have done. [R. 117.] Piasek went to the plant November 17 but was told that he was not then needed and would be called when wanted. [R. 313.]

Respondents conferred with counsel at the Venice plant on the weekend of November 21, after the General Counsel had rested his case. [R. 110.] A cutter was needed for the following Monday, November 23. Acting on the advice of counsel, respondents recalled Rosenthal to work instead of Piasek. [R. 114-115.] On Monday, November 23, respondent's counsel announced at the hearing that Rosenthal had been taken back [R. 247-248] and asked the Board's counsel if he had any objection, but he declined to answer. [R. 255-260.] It was not until December 4, 1953, that Board counsel finally decided that Piasek should have the job rather than Rosenthal. [R. 364-365.] Subsequently, a supplemental complaint was issued on the basis of Piasek's replacement by Rosenthal

[R. 19-21] and in due course the Board ordered Piasek to be reinstated with back pay. [R. 144.]

The Board's position appears to be that in acceding to the Board's then apparent desire to have Rosenthal reinstated in the single cutter job respondents committed an unfair labor practice. Both Rosenthal and Piasek were Union members and both had testified against respondents. At the time Rosenthal was taken back he, but not Piasek, had preferred unfair labor practice charges against respondents and was seeking to recover back pay from them.

It appears to be the Board's contention that in their decision to reinstate Rosenthal to the single cutter job respondents were not motivated solely by a desire to comply with the Board's apparent wishes and minimize their back pay liability. The suggestion apparently is that in thus complying with what the Board apparently wanted respondents were too much consoled by Piasek's departure, and that cheerful compliance with the Government's position was somehow wrong and must be treated as an unfair labor practice lest the disciplinary purpose of the prosecution fail of achievement.

The Board's position is absurd, of course. It may be assumed that after Piasek had shown himself dissatisfied with his conditions of employment [R. 312] respondents had less reason than before to wish to protect him in his job in the face of the Board's contention that respondents had committed an unfair labor practice in preferring him to Rosenthal, his senior in employment. When Piasek joined the Government, the Union, and a number of employees in the prosecution, respondents might well have believed that further resistance to Rosenthal's reinstatement was pointless. But respondents' de-

cision to reinstate Rosenthal was not rendered unlawful by the circumstance that it occurred at a time when it was more acceptable to respondents than it might have been at another time. Responsibility for what happened must be laid to the Government, which placed Piasek's job in jeopardy by claiming that he had been unfairly preferred over Rosenthal, and then called Piasek as a witness against respondents so that respondents no longer had reason to resist the Board's demand for Rosenthal's reinstatement.

Other Board contentions justify only brief notice. For one thing, the Trial Examiner professed to discover evil significance in the fact that Board counsel was not consulted over the weekend of November 21 when it was decided to recall Rosenthal to work. [R. 115.] The point of that observation is not apparent. When consulted November 23 the Board's counsel refused to give an answer, and he was upheld in his refusal by the Trial Examiner; he did not respond until December 4, after two weeks deliberation. [R. 255-256, 364-365.] It would be impossible to run a factory under such supervision by Board counsel.

It is also contended that the finding of discrimination against Piasek is somehow supported by evidence to the effect that on November 14 Lewis telephoned one Greenberg, who formerly worked as a cutter at the Los Angeles plant and who testified: "He asked me if I was working and I said I am working and then I asked him if he straightened out with the union and he said we expect to get straightened out the beginning of next week so I may return and we may get together again." [R. 322.] It is argued that this testimony establishes an intention on Lewis' part to replace Piasek even before he testified

November 16 and merely on the basis of knowledge that he was going to testify. Yet Piasek admitted that on November 13, after respondents knew Piasek was to testify against them, Lewis asked Piasek to come back to work Monday the 16th and Piasek gave him an indefinite answer. [R. 108, 312.] The only testimony on the subject indicates that the decision to recall Rosenthal was reached over the weekend of November 21. If it occurred, the Lewis-Greenberg conversation was unrelated to the replacement of Piasek with Rosenthal. In the posture of the case as it then stood, with respondents being prosecuted for allegedly discriminating against Rosenthal in favor of Piasek, respondents had the right to replace Piasek with Rosenthal as they did. It would not make any difference if respondents had earlier considered replacing Piasek with Greenberg.

There was one job and two candidates, Rosenthal and Piasek. When respondents kept Piasek and let Rosenthal go they were prosecuted for alleged discrimination. When they took Rosenthal back and let Piasek go the same thing happened. The order to reinstate Piasek with back pay is not only unsupported by substantial evidence, but is absurd.

Conclusion.

It is submitted that for the reasons stated the order to bargain, the order to pay back pay to Roark, and the order to reinstate Piasek with back pay are unsupported by substantial evidence on the record considered as a whole and are arbitrary and capricious, wherefore they should be set aside.

Respectfully submitted,

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Attorney for Respondents and Cross-Petitioners.



APPENDIX A.

Supplementing the statutory provisions set forth in the Appendix to the Board's Brief, the following relevant statutory provisions are set forth:

Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Administrative Procedure Act (5 U. S. C. A. Secs. 1001-1011)

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations * * *

APPENDIX B.

(Excerpt from Brief for the National Labor Relations Board in *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.* (C. A. 9), No. 13315, 206 F. 2d 730—footnotes omitted.)

(Pp. 27-32.)

Under the Taft-Hartley Act it is illegal (as it was under the Wagner Act) for an employer to encourage membership in a union by discriminating against employees who refuse to join. Under the Wagner Act, the one exception to this general ban was contained in a proviso to Section 8 (3), the familiarly known "closed shop proviso." Under this proviso an employer and a union representing all of the employees in a unit could voluntarily agree to require that only members of the union be employed by the employer.

Under the Taft-Hartley act the proviso was amended to read as follows:

Provided: That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

As amended, the proviso in effect bans the closed shop and permits only what is known popularly as a union shop. In a union shop, persons not members may be employed provided they join the union within the specified time. The net of the amendment is that no person may

be encouraged to join the union before the thirtieth day of his employment, or if an old employee, within thirty days after the execution of the union-security contract.

The contract executed by respondent and Local 3161 (AFL) (R. 731-733) contained union security provisions which exceeded those permitted by the proviso discussed above. Article III as substituted by Article XII provides that (R. 731): "all production and maintenance employees * * * shall at all times be members in good standing of the Union, subject to the following provisions as to newly hired employees." As the Board found (R. 118), this clause in effect requires "All present employees to be members in good standing" without according them the requisite thirty-day grace period within which to join following execution of the contract, and is hence illegal.

Moreover, the contract (R. 731) requires newly hired employees to obtain a working permit from the union or sign an application for membership in the union. Since this clause requires new employees to resort to some form of union process before the 30 day grace period it is also in excess of the proviso. It is irrelevant that the employees are not required to join before the 30th day. The proviso permits only one specific type of encouragement and that, only after a specified period has elapsed—a new employee may be required to join on or after the thirtieth day of his employment. It does not permit an employer, before the thirtieth day, to require new employees to obtain union work permits or to apply for union membership. In speaking of the proviso to Section 8 (3), the Supreme Court stated: "these words of the exception must have been carefully chosen to express the precise nature and limits" of permissible discrimination based

on union affiliation. *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 694-695; *N. L. R. B. v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2). By executing a contract which illegally discriminated against employees in a manner not permitted by the proviso respondent violated Section 8 (a) (3) of the Act.

Respondent's argument that the illegal clause was never enforced is beside the point. The mere execution of such a contract, even apart from its actual enforcement, constitutes "discrimination in regard to hire and tenure" on the part of the employer, and hence falls squarely within the prohibition of Section 8 (a) (3) of the Act. *Katz v. N. L. R. B.*, 196 F. 2d 411, 415-416 (C. A. 9); *Red Star Express Lines v. N. L. R. B.*, 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B. v. Gaynor News Co.*, 197 F. 2d 719, 723-724 (C. A. 2); *N. L. R. B. v. National Motor Bearing Co.*, 105 F. 2d 652, 660 (C. A. 9); see also *Donnelly Garment Co.*, 50 N. L. R. B. 241, 276, enforced, 165 F. 2d 940 (C. A. 8). This necessarily follows from the language of the section alone which, after prohibiting encouragement or discouragement of union membership "by discrimination in regard to hire or tenure of employment," provides that the "making" of a union-shop agreement shall not be illegal if the specified conditions have been met. As this Court held in *N. L. R. B. v. National Motor Bearing Co.*, *supra*, the "making" of a closed shop contract with an unauthorized representative "was an unfair labor practice," prohibited by Section 8 (3) of the Act.

* * * * *

The Board also concluded that respondent, by consenting to * * * the illegal union-security provisions, violated Section 8 (a) (2) as well as 8 (a) (3) of the

Act. Section 8 (a) (2) makes it an unfair labor practice for an employer to "contribute financial or other support" to any other labor organization. By agreeing to a clause which illegally encourages membership in a union respondent has supported Local 3161 (AFL) in every sense of the word. This type of support is just as real as an outright financial contribution and consequently violates Section 8(a)(2) of the Act. *Katz v. N. L. R. B.*, 196 F. 2d 411, 414-415 (C. A. 9); *N. L. R. B. v. United Hoisting Co.*, 198 F. 2d 465 (C. A. 3); *N. L. R. B. v. Gaynor News Co.*, 197 F. 2d 719, 723-724 (C. A. 2).

No. 15169

**In the United States Court of Appeals
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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JACK LEWIS AND JOE LEVITAN d/b/a CALIFORNIA
FOOTWEAR COMPANY, AND TRINA SHOE COMPANY,
RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
A. The union security clause in the contract between California Footwear and the Union does not excuse the California Footwear's refusal to bargain with the Union-----	2
B. Respondents' attempt to refute the Board's finding that California Footwear refused to bargain with the Union with respect to the transfer of its employees to the Venice plant is unavailing-----	9
Conclusion-----	11

AUTHORITIES CITED

Cases :

<i>Eichleay Corp. v. N. L. R. B.</i> , 206 F. 2d 799 (C. A. 3)-----	5
<i>F. P. C. v. Colorado Interstate Gas Co.</i> , 348 U. S. 492-----	3
<i>Golden Valley Electric Association</i> , 109 NLRB 397-----	7
<i>Hearst Publishing Company, Inc.</i> , 113 NLRB 384-----	7
<i>Hunkin-Conkey Construction Co.</i> , 95 NLRB 433-----	5
<i>Marshall Field & Company v. N. L. R. B.</i> , 318 U. S. 253-----	3
<i>Medo Photo Supply Corp. v. N. L. R. B.</i> , 321 U. S. 678-----	6
<i>N. L. R. B. v. Cheney California Lumber Co.</i> , 327 U. S. 385-----	3
<i>N. L. R. B. v. Childs Co.</i> , 195 F. 2d 617 (C. A. 2)-----	8
<i>N. L. R. B. v. I. A. M.</i> , No. 15,099, decided February 20, 1957-----	7
<i>N. L. R. B. v. International Longshoremen's and Warehousemen's Union</i> , 214 F. 2d 778 (C. A. 9)-----	5
<i>N. L. R. B. v. F. H. McGraw & Co.</i> , 206 F. 2d 645 (C. A. 6)-----	5
<i>N. L. R. B. v. Pappas & Co.</i> , 203 F. 2d 569 (C. A. 9)-----	3
<i>N. L. R. B. v. Pinkerton's National Detective Agency</i> , 202 F. 2d 230 (C. A. 9)-----	3
<i>N. L. R. B. v. Rockaway News Supply Co.</i> , 345 U. S. 71-----	8, 9
<i>N. L. R. B. v. Ronney & Sons Furniture Mfg. Co.</i> , 206 F. 2d 730 (C. A. 9), certiorari denied, 346 U. S. 937-----	5, 8
<i>N. L. R. B. v. Seven-Up Bottling Co.</i> , 344 U. S. 344-----	3
<i>N. L. R. B. v. Sterling Furniture Company</i> , 202 F. 2d 41 (C. A. 9)-----	8
<i>N. L. R. B. v. Swinerton & Walberg Co.</i> , 202 F. 2d 511 (C. A. 9), certiorari denied, 346 U. S. 814-----	4
<i>Polish National Alliance v. N. L. R. B.</i> , 136 F. 2d 175 (C. A. 7)-----	6
<i>Superior Engraving Co., v. N. L. R. B.</i> , 183 F. 2d 783 (C. A. 7), certiorari denied, 340 U. S. 930-----	6
<i>Utah Construction Co.</i> , 95 NLRB 196-----	7
<i>Waterfront Employers of Washington</i> , 98 NLRB 284-----	7

Statute :

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151 <i>et seq.</i>) :	
Section 8 (a) (3)-----	2
Section 10 (e)-----	3

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

In their brief to the Court, respondents do not contest the Board's finding that Trina was merely the *alter ego* of California Footwear, nominally carrying on the business at the Venice location under the control of California Footwear (Br. 3). Respondents nonetheless continue to urge that the Board's bargaining order with respect to the Venice business is improper. In support of their contention respondents advance two reasons which are not discussed in the Board's opening brief. This reply brief is directed solely to the adequacy of these reasons.

A. The union security clause in the contract between California Footwear and the Union does not excuse California Footwear's refusal to bargain with the Union

Contending that the contract in existence between California Footwear and the Union at the Los Angeles plant contained an illegal union security clause under Section 8 (a) (3) of the Act, respondents assert that the Board's bargaining order improperly "perpetuate[s] the coercive effect of [the] illegal * * * contract provisions" (Br. 10). It is not clear whether respondents mean only to defend their refusal to keep the contract in effect at the Venice plant (see Bd.'s brief, pp. 10-11, 41-42), or whether they mean that the alleged illegal clause also excused them from bargaining with the Union respecting the transfer of employees from the Los Angeles to the Venice plant (see Res. Br. p. 7). The latter contention has never specifically been made heretofore in these proceedings. Respondents initially referred to the union security clause in their answers to the complaint before the Board in which they alleged simply that the complaint "has the purpose and effect of enforcing a labor contract which contains an illegal Union Security clause" (R. 11, 13). The trial examiner treated the contentions as directed only to the propriety of respondents' "refusal to give effect to the existing union contract after the move to Venice" (R. 67, 68-69). The Board adopted without discussion the trial examiner's conclusion that the clause in question did not "relieve [California Footwear] of its obligations under the contract" (R. 69, 132-133). Respondents' exceptions to the trial examiner's Intermediate Report

likewise did not specify that they intended to rely upon the allegedly illegal union security clause for any purpose other than to justify the termination of the contract when the Venice operation began (R. 21-25). Accordingly, the additional contention that the clause also served to release California Footwear from its obligation to discuss with the Union the transfer of employees to the Venice plant has never been placed squarely before the Board, and has not been passed on by it.

In these circumstances, it would appear that respondents are not in a position to press the latter contention before the Court. Section 10 (e) of the Act specifically precludes consideration by the courts of appeals of any "objection that has not been urged before the Board, its member, agent, or agency," unless "extraordinary circumstances" excuse the failure to raise the objection, and none is suggested here. By specifying a contention before this Court which at best was left vaguely general before the Board, respondents would set aside "the salutary policy adopted by Section 10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co. v. N. L. R. B.*, 318 U. S. 253, 256.¹

¹ See also *F. P. C. v. Colorado Interstate Gas Co.*, 348 U. S. 492, 498; *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385, 389; *N. L. R. B. v. Pappas & Co.*, 203 F. 2d 569, 571 (C. A. 9); *N. L. R. B. v. Pinkerton's Nat'l Detective Agency*, 202 F. 2d 230, 232-233 (C. A. 9).

Section 10 (e) aside, however, we show below that neither branch of respondents' argument predicated upon the union security clause is meritorious.

1. The union security provision of which respondents complain appears on its face to be fully lawful. It provides that (R. 68):

Apprentices or inexperienced workers with less than 3 months' experience in the shoe industry shall secure work permits from the Union within two weeks of their hiring and shall become members of the Union after 30 days of employment.

The requirement of membership after 30 days of employment complies with the proviso to Section 8 (a) (3),² pursuant to which union security agreements of the type there specified are made permissible, and the requirement that apprentices and inexperienced employees must secure work permits in no way purports to condition their acquisition on union membership. This Court has recognized that agreements whereby "hiring of employees [is] done only through a particular union's office does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' " *N. L. R. B. v. Swinerton & Walberg Co.*, 202 F. 2d 511, 514, certiorari denied, 346 U. S. 814,

² Insofar as material, the proviso reads: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

quoting from the Board's decision in *Hunkin-Conkey Construction Co.*, 95 NLRB 433, 435.³ By this reasoning, the work permit requirement in the present contract would appear no less improper than the kind of non-discriminatory hiring arrangement sanctioned by this Court. Respondents do not suggest, and the record does not show, that any discrimination on the basis of union membership was either intended or practiced under the clause. Accordingly the clause furnishes no valid reason for upsetting the Board's findings either that California Footwear was under a duty to recognize and bargain with the Union at its Los Angeles plant, or that it was not entitled to terminate the contract upon relocation of its business in Venice.⁴

³ See also *N. L. R. B. v. Longshoremen's Union*, 214 F. 2d 778, 781 (C. A. 9); *Eichleay Corp. v. N. L. R. B.*, 206 F. 2d 799, 803 (C. A. 3); *N. L. R. B. v. McGraw Co.*, 206 F. 2d 635, 640 (C. A. 6).

⁴ The union security provision which this Court found illegal in *N. L. R. B. v. Ronney & Sons*, 206 F. 2d 730, certiorari denied, 346 U. S. 937, upon which respondents rely, is completely distinguishable. It contained no 30-day grace period for the acquisition of union membership, and thus did not meet the explicit requirement of the proviso to Section 8 (a) (3) (See n. 2, *supra*). Moreover, unlike the instant case, the work permit clause in *Ronney*, which the Board also contended to be invalid (Res. br., App. 4-5), did not stand alone. It was coupled with an option whereby applicants for employment could obviate whatever preconditions were placed upon the obtaining of work permits by the simple expedient of applying for union membership forthwith instead of awaiting the 30-day grace period. To the extent that the contract clause thus accords preferential treatment to job applicants who apply for union membership forthwith, it violates the Section 8 (a) (3) proscription against discrimination in hire or tenure of employment to encourage union membership.

2. Even if it were to be assumed that the union security clause in this case were invalid, it would nonetheless not excuse California Footwear's refusal to bargain with the Union respecting the transfer of employees to the Venice location. California Footwear did not rest its refusal to negotiate with the Union on the ground that, because of this clause, the Union was not the freely chosen representative of the employees, but on the pretext that it did not control the Venice plant. Respondents' present contention is patently an after-thought advanced to escape answerability for its attempt "to get rid of the union" (R. 155). Cf. *Superior Engraving Co. v. N. L. R. B.*, 183 F. 2d 783, 793 (C. A. 7), certiorari denied, 340 U. S. 930; *Polish National Alliance v. N. L. R. B.*, 136 F. 2d 175, 180-181, aff'd 322 U. S. 643. And respondents' position is no better for having executed the very clause which it now advances as a basis for avoiding its statutory obligation. Cf. *Medo Photo Supply Co. v. N. L. R. B.*, 321 U. S. 678, 687.

More fundamentally, the presence of a work permit clause in a contract between an employer and the certified bargaining representative of its employees does not by itself, even if invalid, require the breaking off of the bargaining relationship. Illustrative of this rule are the cases in which employers and/or unions which have been properly designated as employee representatives are found to have thereafter restrained employee organizational freedom by executing unlawful union security agreements. In this situation the Board ordinarily limits its cease and

desist order to the particular offending provisions of the agreement; it neither invalidates the entire contract, unless it finds the illegal clause inextricably interwoven into the overall agreement, nor does it require that the employer withdraw recognition from the union.⁵ Such a restricted order is fully sufficient to remedy the unlawful practice, and in view of the propriety of the initial recognition given the union, a fact not questioned by respondents in this case, it cannot reasonably be assumed, without more, that the consequences of a single illegal clause are so far reaching as to destroy the representative character of the union.

The same reasoning underlies this Court's recent decision in *N. L. R. B. v. I. A. M.*, No. 15,099, decided February 20, 1957. Finding that a union security provision in that case was valid insofar as it specified that failure to pay dues should result in discharge of the delinquent employee, but invalid insofar as the same penalty was imposed for the failure to pay union assessments, the Court restricted its remedy to invalidating the assessment feature of the clause. The remaining portions of the contract were left in effect (slip opinion pp. 4-5). It follows, of course, that in the Court's view a breaking off of recognition of the union altogether because of the illegal assess-

⁵ See, e. g., *Hearst Publishing Company, Inc.*, 113 NLRB 384, 391; *Golden Valley Electric Assoc.*, 109 NLRB 397, 398; *Waterfront Employers of Washington*, 98 NLRB 284, 288-289, enforced 211 F. 2d 946, 951-952 (C. A. 9); *Utah Construction Co.*, 95 NLRB 196, 209.

ment clause would have been wholly improper. See also, *N. L. R. B. v. Rockaway News Supply Co.*, 345 U. S. 71, 78-79; *N. L. R. B. v. Sterling Furniture Co.*, 202 F. 2d 41, 43, 44 (C. A. 9); *N. L. R. B. v. Childs Co.*, 195 F. 2d 617, 618-619 (C. A. 2). Only where the quantum of coercion on the part of the employer or union reaches the point where it may fairly be said that the union cannot represent the free choice of the employees may disruption of a properly established bargaining relationship be found appropriate.

The difference in the two kinds of cases is aptly illustrated by this Court's decision in *N. L. R. B. v. Ronney & Sons*, 206 F. 2d 730, certiorari denied, 346 U. S. 937, erroneously relied on by respondents. The illegal union security agreement in that case was only one of a series of actions undertaken by the employer "designed to oust [an incumbent union] from its plant and replace it with the [favored union]." 206 F. 2d at 734. The overall assistance given the favored union in that case was plainly adequate to warrant the conclusion that recognition of it should be withdrawn until it could demonstrate in a Board election that the employees, free from intimidation and interference, wished to be represented by it. All that is relied on by respondents in the instant case to show that the Union "was maintained by illegal compulsory union membership contract provision" (Res. br., p. 7) is the alleged invalidity of the work permit requirement respecting inexperienced employees, found in an otherwise valid union security agreement. As we have shown, this is an insufficient ground upon which to

put an end to a properly established bargaining relationship.

This Court's recent decision in the *I. A. M.* case, *supra*, also disposes of the other branch of respondents' contention, i. e., that the presence of the work permit clause excused California Footwear from keeping the contract in effect at the Venice plant. Assuming again, *arguendo*, that the clause in question was invalid, the course open to California Footwear, just as that open to the employer in the *I. A. M.* case, was to cease giving effect to the clause, but not to terminate the entire contract. Here, no less than in the *I. A. M.* case, the allegedly illegal clause was severable from the remainder of the contract, and thus "in no way invalidates the [remaining] provision[s]." *I. A. M.* case, slip opinion, p. 2. See also *N. L. R. B. v. Rockaway News Supply Co.*, 345 U. S. 71, 78-79.⁶

B. Respondents' attempt to refute the Board's finding that California Footwear refused to bargain with the Union with respect to the transfer of its employees to the Venice plant is unavailing

Respondents do not contend that the transfer of employees to a new plant is an inappropriate subject for collective bargaining or that California Footwear did not control operation at the new location in

⁶ As noted by the Trial Examiner (R. 68-69), here, as in the *Rockaway News* case, the contract contained a separability clause. Moreover, it is noteworthy that the Union in this case had not sought to enforce the union security clause, and had, during the contract's existence, proposed to delete it (*ibid.*). Finally, it may be observed that there is no requirement in the Board's order that the contract in this case, which had expired before the hearing in this case had closed, be maintained in effect (R. 142-145).

Venice. On this phase of the case respondents argue only that California Footwear did not refuse to discuss the transfer question with the Union, but, on the contrary, that Lewis, on behalf of California Footwear, referred the Union to Fellman as spokesman for the company on this matter (Res. Br. 8). The record in no way supports this factual contention.

Lewis' stated reason for referring the Union agent to Fellman, when requested to discuss the transfer of employees to the Venice plant, was that California Footwear "was going out of business," not that Fellman would discuss the matter for California Footwear (R. 194, see Bd's opening brief, pp. 9-10). Fellman was held out by Lewis as the owner and operator of a business which was entirely separate and independent from California Footwear. In short, Lewis made it clear that California Footwear would not discuss the matter and that negotiations with Fellman would have to be undertaken, not on the assumption that California Footwear was moving to a new location, but that Fellman had no obligation to regard the employees at the Los Angeles plant as employees of the company he represented, and that he would be hiring employees to work for a different employer. It is thus plain that there is no factual support for respondents' contention.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that a decree should be issued enforcing the Board's brief in full.

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MARCH 1957.



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PETITION FOR REHEARING

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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

PETITION FOR REHEARING

The National Labor Relations Board respectfully petitions the Court for rehearing of its decision herein, insofar as it has eliminated, by its decree of August 19, 1957, paragraph 1 (c) of the Board's order. This paragraph requires respondents to cease and desist from "In any other manner interfering with, restraining, or coercing their employees in the exercise of their right[s] under Section 7 of the Act[]." .

In accordance with its opinion of July 1, 1957, the Court's decree enforces those parts of the Board's order which remedy respondents' unlawful discrimination against employee Roark and their refusal to bargain with the Union, and remands to the Board

(1)

for reconsideration that part of its order respecting the alleged discrimination against employee Piasek. The propriety of paragraph 1 (c), however, was not discussed in the Court's opinion, nor was its elimination requested by respondents. In the absence of an expression of the Court's reasons for denying enforcement of paragraph 1 (c), we are not certain of the grounds for the Court's action. In any event, as we show below, we do not believe the validity of this provision was properly before the Court for decision. More importantly, we believe that the Court may have overlooked the fact that the deletion of paragraph 1 (c) has eliminated altogether a remedy for conduct which, under the findings of the Board and the decision of this Court, is violative of the Act. Finally, we believe, even apart from the foregoing considerations, that under established authority enforcement of paragraph 1 (c) is warranted by the serious and pervasive character of the other violations found. None of these contentions, which we briefly develop below, has been presented to the Court in the briefs heretofore filed inasmuch as we were not aware that the validity of paragraph 1 (c) of the Board's order was in issue.

1. The cease and desist provision in question was adopted by the Board from the Trial Examiner's recommended order (R. 124, 143). No discussion of the provision is contained in the Board's decision, as respondents did not raise the matter before the Board.¹

¹ Respondents' blanket exception to all parts of the recommended order directed against them (R. 25) does not suffice to

Similarly, neither respondents' Statements of Points nor their brief before this Court makes any reference to paragraph 1 (c) of the Board's order.

In these circumstances, it would appear that Section 10 (e) of the Act presents a procedural bar to judicial modification of this portion of the Board's order. Section 10 (e) provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This preclusionary rule operates not only to bar belated contentions of parties,² but also to prevent consideration by a court *sua sponte* of questions not properly preserved. Thus, in *F. P. C. v. Colorado Interstate Gas Co.*, 348 U. S. 492, the Supreme Court had before it a provision in Section 19 of the Natural Gas Act (52 Stat. 831-832, as amended, 15 U. S. C. 717) which virtually parallels the language of Section

preserve the present question as to the validity of paragraph 1 (c) of the order. Under Section 10 (e) of the Act exceptions must be sufficiently explicit to afford "the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Company v. N. L. R. B.*, 318 U. S. 253, 256. And, as the Supreme Court stated in the cited case, "Such a general objection" as that taken by respondents here does not meet this requirement. 318 U. S. at 255. Moreover, respondents' brief to the Board made no contention respecting the validity of paragraph 1 (c) of the order.

² See, e. g., *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B. v. Pinkerton's National Detective Agency*, 202 F. 2d, 230, 232-233 (C. A. 9); *N. L. R. B. v. Pappas & Co.*, 203 F. 2d 569, 571 (C. A. 9).

10 (e) of the Act.³ After ruling that a party in that case was barred by the Natural Gas Act's provision from raising an objection before the court of appeals which it had not specifically urged before the Federal Power Commission, the Supreme Court also determined that the same provision precluded the court from considering the objection, *sua sponte*. As the Court stated, "To allow a Court of Appeals to intervene on its own motion would seriously undermine the purpose of the explicit requirements of Section 10 (b) that objections must first come before the Commission." 348 U. S. at 498-499. See also this Court's decision on petition for rehearing in *N. L. R. B. v. Jay Co.*, 227 F. 2d 416, 419-420.

In sum, the effect of Section 10 (e) is to require the courts of appeals "to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested." *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385, 389. Issues pertaining to the validity of paragraph 1 (c) of the Board's order in this case would appear clearly to fall within this rule. Accordingly, we submit that the Court should reconsider its deletion of that provision, and should enforce it in full.

2. The requirement of paragraph 1 (c) of the Board's order that respondents cease and desist from "interfering with, restraining, or coercing their em-

³ Section 10 (b) of the Natural Gas Act reads: "* * * No objection to the order of the [Federal Power] Commission shall be considered by the court [of appeals] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

ployees in the exercise of their rights [under Section 7 of the Act]” provides the only remedy given for respondents’ illegal acts of surveillance and interrogation of their employees. See the Board’s main brief, pp. 26–30. The Board’s findings of illegality in this respect were not contested in respondents’ brief to the Court (Res. Br. p. 2), and although mentioned, were not discussed in the Court’s opinion of July 1, 1957 (sl. op. p. 3). In view of these circumstances, together with the Court’s stated willingness “to promptly enforce the order, except as to Piasek” (*id.*, p. 8), we assume that the Board’s findings as to respondents’ surveillance and interrogation have been affirmed. The effect of eliminating paragraph 1 (c) of the Board’s order from the enforcement decree, however, is to leave unremedied these serious violations of the Act. We cannot believe that this consequence was intended, and submit that the Court should reconsider its action and reinstate paragraph 1 (c) in order to provide a complete remedy for the violations found.

3. In addition to providing a specific remedy for unlawful acts of surveillance and interrogation, paragraph 1 (c) of the Board’s order performs the important function of preventing respondents from continuing to oppose the Union by other acts of interference with the exercise of their employees’ statutory rights. This provision is couched in the conventional language which has been sanctioned by the Supreme Court as well as this Court in cases where “the record disclose[s] persistent attempts by varying methods to interfere with the right of self-organization in cir-

cumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future'' *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 438. See also, *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 390; *N. L. R. B. v. Globe Wireless*, 193 F. 2d 748 (C. A. 9); *N. L. R. B. v. Reeves Rubber Co.*, 153 F. 2d 340, 343 (C. A. 9). The record of the instant case plainly fits the foregoing description. As more fully detailed in our main brief (pp. 9-15), respondents resolutely attempted by a variety of techniques to eliminate the Union from the Venice plant. Thus, the misrepresentation to the Union that California Footwear was going out of business, the refusal to discuss with the Union the transfer of old employees to the new location in Venice, the discontinuance of the existing collective bargaining contract and the refusal to recognize the Union at the Venice location, the surveillance of a Union meeting, the coercive interrogation of employees at the Venice plant, and the refusal to hire employee Roark because she was a Union steward constitute a pattern of opposition to employee organization reflective of an intent to get rid of the Union at any cost. In short, this case exemplifies the typical situation which calls for the general cease and desist order contemplated by the Supreme Court in the *Express Publishing* case, *supra*.⁴

⁴ The recent decision of this Court in *N. L. R. B. v. Shuck Construction Co.*, decided May 16, 1957, 40 LRRM 2167, in

CONCLUSION

For these reasons, it is respectfully submitted that this petition for rehearing be granted, and that upon rehearing the Court reinstate paragraph 1 (c) of the Board's order in its enforcement decree of August 19, 1957.

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SEPTEMBER 1957.

which the Court eliminated a provision of the Board's remedial order that was directed at conduct "like or similar" to that which was found unlawful, may readily be distinguished from the instant case. Thus, the remaining enforced provisions of the order in the *Shuck* case remedied the specific conduct found in that case to be violative of the Act. Here, to the contrary, deletion of paragraph 1 (c) leaves unremedied certain of respondents' activities which violated the Act. Moreover, the unfair labor practices in *Shuck* were confined to the maintenance and enforcement of an illegal union security contract, which the Court may have thought could effectively be reached by an order tailored to the particular violations. In this case, on the other hand, the diversity and frequency of respondents' violations indicate a general disregard for the statutory rights of their employees, so that it may reasonably be anticipated that other acts of interference might occur in the future unless expressly prohibited by judicially enforced order.

CERTIFICATE OF COUNSEL

Stephen Leonard, Associate General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

STEPHEN LEONARD,
Associate General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this *16th* day of September 1957.

No. 15,171

IN THE

United States Court of Appeals
For the Ninth Circuit

JESSE FLORES and CARMEN FLORES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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PAUL P. O'BRIEN, CLERK

Subject Index

Page

Statement of the case	2
Argument	3

Table of Authorities Cited

Cases	Page
Beacham v. United States, 218 F. 2d 528.....	5
Becker v. United States (9th Cir.) 91 F. 2d 550.....	3
Blockburger v. United States, 284 U.S. 299.....	5
Bruno v. United States (9th Cir.) 164 F. 2d 693, cert denied	5
Gargano v. United States (9th Cir.) 140 F. 2d 118.....	5
Hornbrook v. United States, 216 F. 2d 112.....	3
Jackson v. United States (9th Cir.) 102 F. 473.....	3
Moore v. Aderhold, 108 F. 2d 729.....	3
Schultz v. Zerbst, 73 F. 2d 668.....	3
Sorrentino v. United States, 163 F. 2d 627.....	5
United States v. Daugherty, 269 U.S. 360.....	5
United States v. Kelley, 186 F. 2d 598, cert. denied.....	5
United States v. Sorecy, 151 F. 2d 899.....	3
United States v. Thompson (2d Cir.) 214 F. 2d 545.....	3

Codes

28 U.S.C., Sections 1291 and 2255	1
---	---

Rules

Federal Rules of Criminal Procedure, Rule 35	1
--	---

No. 15,171

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JESSE FLORES and CARMEN FLORES,	}
<i>Appellants,</i>	
vs.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

BRIEF FOR APPELLEE.

Jurisdiction is invoked under Sections 1291 and 2255 of Title 28 United States Code. In our opinion no motion was ever made under Section 2255. Appellants have appealed from a motion made under Rule 35 of the Federal Rules of Criminal Procedure to modify the judgment. No constitutional issue was raised in this motion. The motion was apparently not made pursuant to the first sentence of Rule 35, which provides, "The court may correct an illegal sentence at any time," but was directed to the general power of the court to modify a sentence within 60 days of the judgment. We entertain serious doubts as to whether this court has any jurisdiction of this appeal

since the record does not indicate any appeal was taken from the judgment of conviction.

STATEMENT OF THE CASE.

Appellants were indicted on December 21, 1955 for violation of the narcotic laws of the United States. Appellant Jesse Flores was named in the second, third, fourth, fifth, sixth and seventh counts of the indictment, and appellant Carmen Flores was named in the second, fifth, sixth and seventh counts of the indictment. Appellants both admitted one prior conviction of the Federal Narcotic Laws. Appellant Jesse Flores was subject to a penalty, if all counts had run consecutively, of 60 years. Appellant Carmen Flores was subject, if all counts had run consecutively, to a penalty of 40 years. Appellants were convicted on all counts of the indictment. Appellant Jesse Flores received a total sentence of 30 years imprisonment and \$6.00 fine. Counts two and three were ordered to run concurrently. Counts four and five were ordered to run concurrently with each other, and consecutively to counts two and three. Counts six and seven were ordered to run concurrently with each other and consecutively to counts four and five. Appellant Carmen Flores received a total sentence of 20 years. Counts two and five were ordered to run concurrently with each other. Counts six and seven were ordered to run concurrently with each other and consecutively to counts two and five. Judgment was imposed on January 31, 1956. A motion to modify un-

der Rule 35 was made on March 19, 1956. Judge Edward P. Murphy denied the motion on March 26, 1956, as follows:

“This motion to modify judgment, noticed for hearing on March 27, 1956, has been forwarded to me at Honolulu, T.H., where I am on assignment.

“The granting or denial of a motion to modify judgment is within the sound discretion of the Court. I pondered long before the imposition of these lengthy sentences. I am fully cognizant of all the facts and circumstances of this case. The laws against the narcotics traffic must be enforced, if they are to be a real deterrent.

“Accordingly, the motion to modify the judgment as to each defendant is denied.

“Dated: March 26, 1956.

“/s/ Edward P. Murphy

“United States District Judge.”

Notice of appeal from this order was filed on June 4, 1956. Apparently the notice was received by the clerk on May 10, 1956.

ARGUMENT.

Appellants' whole argument is founded on the contention that a sentence of 30 and 20 years for violation of the law against the sale and concealment of narcotic drugs constitutes cruel and unusual punishment. They are apparently under a misapprehension as to the manner in which they were sentenced.

Appellants claim at page one of their brief that they were sentenced to consecutively five year sentences. The record, however, discloses that they received ten year sentences, part of which ran concurrently and part consecutively. Appellants had both previously violated the narcotic laws. Jesse Flores was at one time a professional boxer and, in fact, once fought for the lightweight championship of the world. The court might well have taken into account, in sentencing Mr. Flores, the fact that as a famous athlete he had the power to influence the conduct of hero-worshipping youngsters. The court in considering Mrs. Flores' sentence might well have considered her influence on her husband. In their motion to modify appellants have admitted that Carmen Flores was a user of narcotics long before Jesse Flores. The Appellate Courts have held uniformly that they have no power to interfere with the imposition of sentence if the sentence is within the statutory maximum.

Jackson v. United States, (9th Cir.) 102 F. 473;

Becker v. United States (9th Cir.) 91 F. 2d 550;

United States v. Sorcey, 151 F. 2d 899;

Moore v. Aderhold, 108 F. 2d 729;

Schultz v. Zerbst, 73 F. 2d 668;

Hornbrook v. United States, 216 F. 2d 112;

United States v. Thompson (2d Cir.) 214 F. 2d 545.

In narcotic cases it has been held that even where defendants are charged with separate sections of the

various narcotic laws, involving but one transaction, that consecutive sentences may validly be imposed.

Blockburger v. United States, 284 U.S. 299;
Gargano v. United States (9th Cir.) 140 F. 2d
 118;

Sorrentino v. United States, 163 F. 2d 627;
Bruno v. United States (9th Cir.) 164 F. 2d
 693, cert. denied.

The sentence to be imposed for violation of criminal law is within the discretion of the trial court. That discretion should not be disturbed on appeal.

United States v. Daugherty, 269 U.S. 360;
United States v. Kelley, 186 F. 2d 598, cert.
 denied.

See *Beacham v. United States*, 218 F. 2d 528, where the defendant had no prior record. The crime involved marihuana instead of heroin, as here, and where the court imposed five consecutive five year terms.

This appeal is without merit and should be dismissed, or the order appealed from affirmed.

Dated, San Francisco, California,
 September 17, 1956.

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 RICHARD H. FOSTER,
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Attorneys for Appellee.

No. 15,174

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

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OCT 10 1956

Subject Index

	Page
Statement of jurisdiction	1
Nature of the controversy	2
Statutes involved	4
Statement of the case	6
A. Petitioner established that legitimate business purposes motivated its acquisition of Palos Verdes.....	7
1. Petitioner's business purposes in acquiring Palos Verdes were set forth in its corporate action duly taken	7
2. On the same day Palos Verdes was acquired, petitioner's president worked out a program for the profitable sale of lots	13
B. The evidence established that, upon acquisition of Palos Verdes, petitioner utilized it as a profitable subsidiary	14
1. Petitioner almost immediately realized a profit of 33% on its investment by sales of Palos Verdes lots	14
2. Petitioner caused Palos Verdes to replace its lots with other properties calculated to afford petitioner the same outlet for its products and for expansion of its activities	15
3. In furtherance of petitioner's plans for expansion of its oil-well equipment business, Palos Verdes acquired profitable oil leases	19
4. Palos Verdes also leased and operated an oil refinery in order to effectuate petitioner's plans for expansion of its oil equipment business	20
5. In addition, petitioner's oil equipment business was promoted by Palos Verdes' acquisition of a boat for charter to oil companies engaged in geological work off the Coast	21

	Page
6. Acquisition of Palos Verdes provided a highly profitable outlet for disposal of Chemical Warfare containers when the original plan for their use could not be carried out	22
C. Experience has demonstrated the good faith and sound judgment of petitioner in making its decision to acquire the Palos Verdes lots	24
D. Petitioner established that it had no motive whatever for the acquisition of Palos Verdes as a "tax loss" corporation, in that petitioner had no large past, present or prospective profits or high-earning assets..	26
Specification of errors	28
Summary of argument	30
Argument	31
I. The Tax Court erroneously based its decision wholly upon an absent presumption in favor of respondent's determination	31
A. The decision was expressly predicated upon the inapplicable presumption	31
B. The Tax Court erred in relying upon the presumption	32
C. The Tax Court failed to give any consideration to the merits of the case independently of respondent's determination	37
II. The Tax Court erroneously failed to consider material and undisputed evidence comprising a substantial part of petitioner's case	40
III. The findings of the Tax Court do not support its conclusion	42
A. The Tax Court failed to find any ultimate facts which would sustain its conclusion	42
B. The evidentiary findings made by the Tax Court sustain the contrary conclusion	43
IV. The decision of the Tax Court is not supported by the evidence	45

SUBJECT INDEX

iii

	Page
A. Petitioner affirmatively established that it did not acquire Palos Verdes for the principal purpose of avoiding taxes	45
B. The presumption in favor of respondent's ruling has no probative force	48
C. The Tax Court could not disregard petitioner's undisputed evidence	49
Conclusion	53

Table of Authorities Cited

Cases	Pages
Alcorn Wholesale Co. (1951), 16 T.C. 75	46, 47
Belyea's Estate v. Commissioner (1953, 3rd Cir.), 206 F.2d 262	34
Berland's Inc. of South Bend (1951), 16 T.C. 182	46, 47
Chelsea Products, Inc. (1951), 16 T.C. 840 (affirmed (3rd Cir.) 197 F.2d 620)	46
Commodores Point Terminal Corp. (1948), 11 T.C. 411	48
Crude Oil Corp. v. Commissioner (1947, 10th Cir.), 161 F.2d 809	33, 51
Foran v. Commissioner (1948, 5th Cir.), 165 F.2d 705	50
Gillette's Estate v. Commissioner (1950, 9th Cir.), 182 F.2d 1010	39
Hemphill Schools, Inc. v. Commissioner (1943, 9th Cir.), 137 F.2d 961	4, 34, 37, 48
J. E. Dilworth Co. v. Hensee (1951, M.D. Tenn.), 98 F. Supp. 957	46
J. M. Perry & Co. v. Commissioner (1941, 9th Cir.), 120 F.2d 123	34, 49
R. P. Farnsworth & Co. v. Commissioner (1953, 5th Cir.), 203 F.2d 490	52
U. S. v. American Bell Telephone Co. (1896), 167 U.S. 224	52
Wiget v. Becker (1936, 8th Cir.), 84 F.2d 706	36, 37, 49, 52
Wright-Bernet v. Commissioner (1949, 6th Cir.), 172 F.2d 343	51

Codes

Internal Revenue Code of 1939:	
Section 129 (58 Stat. 47-48)	3, 4, 29, 31, 46, 47
Section 141	5, 28, 46, 48
Internal Revenue Code of 1954, Sections 7482 and 7483	2

No. 15,174

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Petitioner American Pipe & Steel Corporation is a Nevada corporation organized in 1929 with its principal place of business in Alhambra, California (Tr. p. 51*). Petitioner's consolidated tax returns for the taxable years 1944, 1945 and 1946 were filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles (Tr. p. 52).

Respondent Commissioner determined deficiencies in income and excess profits taxes due from petitioner

*The statements set forth in the findings of the Tax Court, and appearing at pages 50-53 of the transcript, are based upon the stipulation of facts entered into by the parties and filed with the Tax Court (Tr. p. 115).

for the years 1944, 1945 and 1946, as follows (Tr. p. 50):

Year	Deficiency in Income Taxes	Deficiency in Excess Profits Taxes
1944	\$23,504.02	\$34,955.02
1945	17,753.50	84,299.14
1946	53,264.70	

Pursuant to Section 272 of the Internal Revenue Code of 1939, petitioner duly filed its petition for redetermination of the deficiencies with The Tax Court of the United States, being Docket No. 28539 (Tr. pp. 7-43), respondent filed its answer (Tr. pp. 43-46), and the case was tried upon a stipulation of facts and oral and documentary evidence.

The Tax Court entered findings of fact and its opinion (Tr. pp. 49-79) and, on February 28, 1956, entered its decision whereby it ordered and decided that there were deficiencies in petitioner's income tax and excess profits taxes for the years in question in the amounts determined by respondent (Tr. p. 80).

Within three months thereafter, and on May 22, 1956, petitioner filed its petition for review of the decision of the Tax Court pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954 (Tr. pp. 647-651). These two sections are believed to sustain the jurisdiction of this Court.

NATURE OF THE CONTROVERSY.

By stipulation, the sole issue presented to the Tax Court was whether petitioner was entitled to the tax

benefits which it claimed in its consolidated tax returns for the years 1944, 1945 and 1946 by reason of petitioner's acquisition and ownership of the entire capital stock of Palos Verdes Estates, Inc., a California corporation (Stipulation of Facts, paragraph 16).

Respondent Commissioner determined that, on or about December 2, 1943, petitioner acquired all of the capital stock of Palos Verdes Estates, Inc. (hereinafter referred to as Palos Verdes), for the principal purpose of avoiding Federal income and excess profits taxes by securing the benefit of deductions, credits or other allowances of Palos Verdes which would otherwise not be enjoyed by petitioner, within the meaning of Section 129 of the Internal Revenue Code of 1939, as amended (Tr. pp. 30-31).

Respondent further determined that the privilege of filing consolidated income and excess profits tax returns for the years in question, including therein the operations of petitioner and Palos Verdes, was not within the intent or purview of Section 141 of the said Code (Tr. p. 31).

The Tax Court upheld the respondent's determination.

The Court's findings of fact, however, consist simply of a rambling recital of portions of the evidence; no conclusionary or ultimate facts were found (Tr. pp. 51-75). The opinion of the Tax Court is equally obscure. No evidence was reviewed in the opinion, no reasons were advanced for the decision,

and the opinion does not reveal any basis for upholding respondent's determination (Tr. pp. 75-79).

It is apparent that the Tax Court relied wholly upon the presumption of correctness of respondent's determination (Tr. pp. 75, 79) and, in such reliance, the Court erred. Petitioner having established at least a *prima facie* case in support of its position, the presumption ceased and, therefore, could not furnish any basis for the decision (*Hemphill Schools, Inc. v. Commissioner* (1943, 9th Cir.), 137 F.2d 961, 964).

STATUTES INVOLVED.

Section 129 of the Internal Revenue Code of 1939 was added by an Act of February 25, 1944, and was made applicable to taxable years beginning after December 31, 1943 (58 Stat. 47-48). It provided, in part, as follows:

“(a) *Disallowance of deduction, credit, or allowance.* If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation . . . and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clauses (1) and (2), control means the owner-

ship of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation”

Section 141 of the Code provided, in part, as follows:

“(a) *Privilege to file consolidated returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns . . .

“(d) *Definition of ‘affiliated group.’* As used in this section, an ‘affiliated group’ means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

“(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the non-voting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

“(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the non-voting stock of at least one of the other includible corporations. . . .”

STATEMENT OF THE CASE.

Petitioner sustained its burden of proving the allegations of its petition by establishing that legitimate business purposes, and not tax avoidance or evasion, motivated its acquisition of the capital stock of Palos Verdes Estates, Inc.

Petitioner proved this in the Tax Court by showing an absolute lack of motive for acquiring a "tax-loss" corporation; that is, (a) by showing that it acquired Palos Verdes through appropriate and regular corporate action for business purposes; (b) by establishing that it did thereafter use Palos Verdes as a profitable subsidiary; and (c) by proving, through the future development of the Palos Verdes area, that petitioner used good business judgment in acquiring Palos Verdes.

This showing was not met or controverted by respondent.

In view of the case established by petitioner, the presumption in favor of respondent's ruling had no probative force as evidence to offset or rebut petitioner's case. When the presumption vanished from the case, respondent thereupon had the burden of meeting petitioner's evidence. Having failed to do so, there is no evidence to support the Tax Court's decision; the decision should have been in favor of petitioner.

The facts proved by petitioner are as follows:

A. PETITIONER ESTABLISHED THAT LEGITIMATE BUSINESS PURPOSES MOTIVATED ITS ACQUISITION OF PALOS VERDES.

It was proved, without contradiction, that proper business purposes were the only forces motivating petitioner's acquisition of the capital stock of Palos Verdes. The evidence was as follows:

1. Petitioner's business purposes in acquiring Palos Verdes were set forth in its corporate action duly taken.

The reasons why petitioner acquired the stock of Palos Verdes were expressed at length in its president's letter of November 25, 1943, to the board of directors of petitioner and such reasons were restated in his uncontradicted testimony at the trial (Ex. 20; Tr. pp. 391-396).

Petitioner's president, Mr. Lane, had been a licensed real estate broker since 1936 (Tr. p. 352), he had considerable experience in handling and managing properties and leases, and in subdivision projects (Tr. pp. 328-329, 342, 351-352), and he was familiar with the Palos Verdes project (Tr. pp. 329-332).

The letter of November 25th commenced as follows:

“Last May, Robert P. Archer wrote us regarding the Palos Verdes Estates, Inc. and a copy of that letter is attached hereto. Of course, at that time we were not interested in his proposition, but during the interim I have occasionally discussed his situation with him and have followed the activities of the company.

“Archer's original plan was to acquire controlling interest in the company in order to elect

a new Board of Directors, which would seek to rehabilitate the company in the real estate business. The present Board of Directors, however, attempted this rehabilitation by making the stock assessable and wanted the stockholders to put up sufficient money to pay the taxes and proceed with the development and/or sale of its properties. The plan failed and Archer does not have the funds to proceed with his original plans, therefore, he has informally proposed that we pay him his costs for his interest in the company and in such event he will seek to acquire the rest of the outstanding stock. This would give us Palos Verdes as a wholly owned subsidiary for approximately \$13,000.00.

“In the exhaustive study which I have made, I find that the lots owned by the company come under three classifications:

(1) Represents approximately 147 lots in the Lunada Bay Area. All lots in this are contiguous.

(2) Represents approximately 315 lots located in the uppermost part of the tract and covers about 115 acres. All lots in this area are contiguous.

(3) Represents approximately 235 to 250 lots scattered throughout the tract.

“There are approximately 11,000 lots originally subdivided in the subdivision owned by Palos Verdes Estates, Inc. There is only one real estate broker doing business at the present time in the City of Palos Verdes, which leaves room for another live wire real estate company for post-war development.

“As you know, I have been a real estate broker for a number of years and am thoroughly familiar with the problems arising in the real estate business, as well as the profits to be gained.

“The American Pipe & Steel Corporation has many activities in which the control of a real estate company having powers broad enough to engage in other lines of business would be a distinct advantage. In this connection, I will list below several of these advantages which we have discussed informally many times. . . .”

Thereupon, the letter listed the advantages to petitioner of acquiring Palos Verdes, as follows:

Water pipe and casing business.

“(1) In connection with our water pipe and casing business, we have often lost large sales when competitors had an ‘in’ with the developer of a subdivision or could have taken property as part payment for the pipe and well casing.

“If the development and sale of the Palos Verdes properties and other real estate put into the company, we could tie the sale of pipe and casing in with the sale of the property.

“When subdivision developers (as we have seen in the past) are under-financed, we could buy part of the property as our security, and after supplying the pipe and well casing, could realize our profit as the subdivision was sold.”

Oil well equipment business.

“(2) In connection with our oil well equipment business, we have often seen competitors take leases and also purchase real property outright, thereby being in a position to tie in the

sale of their oil field equipment with the leasing of the properties to the oil companies. This is quite an old procedure in California and Texas, and if we owned Palos Verdes, oil properties could be taken by them for leases or sub-leases to oil companies who would use American Pipe's products."

Sale of steel houses.

"(3) For post war, Celotex Corporation has approached us informally on the matter of handling the sale and erection of steel houses which have been designed by the Pierce Foundation in cooperation with the Republic Steel Corporation and the Celotex Corporation. If we had the Palos Verdes Estates, Inc. or some subsidiary real estate company, it would provide a controlled outlet for fostering the development of sales of steel houses. Whether or not we make a deal with Celotex or others, I believe that the steel houses will be a very lucrative post-war item, and the American Pipe should be interested in the fabrication and erection of these houses in one way or another."

Sale of liquefied gas containers.

"(4) In connection with the manufacture of propane and other liquefied gas containers, we have seen various distributors in the east, and particularly Ernest Fannin in Arizona, build very lucrative businesses by loaning storage equipment to consumers and thereby controlling the sale of their liquefied gas. This, as you know, enables the liquefied gas distributor to charge from 1¢ to 3¢ a gallon more for his product than is charged by distributors having uncontrolled

outlets and when the consumer owns his own storage equipment.

“You are also familiar with the fact that we have often considered informally starting the distribution of liquefied gases to enhance the value of containers. If we were to acquire Palos Verdes, a number of the lots could be set aside for development and containers would be furnished the purchasers of houses in the area, and Palos Verdes could distribute liquefied gas instead of running gas lines to the areas which do not have gas lines. This particular area would be a very good one in which to start the distribution of liquefied gases because there are approximately 20,000 acres undeveloped in which natural gas lines have not yet been laid. During the next 10 or 15 years a good part of this property is likely to be developed and built up.

“Inasmuch, as we would want to start in the distribution business in a small way, one of the areas now in Palos Verdes Estates, Inc. presents an ideal place to start with a very small initial investment.”

The letter concluded with the following proposals:

Proposal for acquisition and use of Palos Verdes.

“I, therefore, propose that the American Pipe & Steel Corporation purchase the Palos Verdes Estates, Inc. for the purpose of handling all of American Pipe’s activities outside of the actual fabrication of steel products. I propose that a Board of Directors be elected which has the experience and ability to engage the company in the real estate business and any other profitable

activities which will directly or indirectly benefit the American Pipe & Steel Corporation.”

Proposal for sale of Palos Verdes lots.

“I would propose to this Board that the Area No. 3 be sold at public auction, over and above taxes, to raise sufficient funds to pay off the taxes on the other two areas, and that if sufficient money were not raised in this method, that one of the other areas also be sold. However, the contiguous lots should be sold at a private sale rather than at auction. This would leave the company with less property, but it would be free and clear of taxes which would enable Palos Verdes to be a factor in the real estate business in Southern California.”

Proposal for sale to Palos Verdes of rejected containers.

“I would also propose that American Pipe (in the event that they acquire Palos Verdes) sell to Palos Verdes all of the rejected containers from the Chemical Warfare Contract at a price above what we have been offered by the junk dealers.

“This would enable Palos Verdes to enter into the distribution of L.P. Gas.”

A meeting of petitioner's Board of Directors was held the following day, November 26, 1943, to consider Lane's letter and proposal (Tr. pp. 460-461). At the meeting Lane discussed the proposal at length, whereupon a resolution was adopted authorizing Lane, as president of petitioner, to acquire all stock of Palos Verdes Estates, Inc. (Ex. 36).

2. On the same day Palos Verdes was acquired, petitioner's president worked out a program for the profitable sale of lots.

On December 2, 1943 (the day that petitioner acquired the stock of Palos Verdes), Lane received from Haggott, the then president of Palos Verdes, a typewritten tabulation or inventory of the property owned by Palos Verdes, showing, among other things, the total taxes on the lots (Ex. 24; Tr. pp. 408-409). At the same time Haggott also sent a list of the lots, showing lot, block and tract numbers and zone classifications (Ex. 26; Tr. pp. 411-412). The tabulation and list were both attached to a note from Haggott to Lane, which pointed out how future real property taxes on the lots might be reduced (Ex. 25; Tr. p. 409).

On the same day (December 2, 1943), Lane made handwritten computations on the tabulation for the benefit of his "partner," Kreiger, and wrote a note to Kreiger on the top of the paper, as follows (Ex. 24; Tr. p. 410): "12/2/43 Woody—Note & return (This is how we are figuring the profit on the lots)."

Lane's handwritten computations indicated that the value of the lots on an acreage basis was about \$1,000 per acre on approximately 300 acres, and that lots should bring about \$1,500 each on a building program where streets and utilities were in (about 100 lots) and about \$750 each where streets and utilities were not in (about 580 lots) (Ex. 24; Tr. pp. 416-417). Figuring sales of the 100 lots at \$1,500, sales of 500 lots at \$750, and sales of 80 lots at only \$400, Lane calculated gross sales at \$550,000 (Ex. 24; Tr. pp. 417-418).

From the gross sales, Lane calculated deductions of \$97,406 for property taxes due, \$5,700 for assessments of the Palos Verdes Home Association, approximately \$22,000 for property taxes for the next two or three years, and \$75,000 for the sales expenses; after making these deductions, Lane wrote that \$350,000 "should clear" (Ex. 24; "Recap"; Tr. p. 418). Lane also noted, "Our Cost approx \$12,000" (Ex. 24; Tr. p. 418).

B. THE EVIDENCE ESTABLISHED THAT, UPON ACQUISITION OF PALOS VERDES, PETITIONER UTILIZED IT AS A PROFITABLE SUBSIDIARY.

Petitioner's use of Palos Verdes as an effective and profitable subsidiary, in substantial conformity with petitioner's plans at the time of acquisition, was shown by the following evidence:

1. **Petitioner almost immediately realized a profit of 33% on its investment by sales of Palos Verdes lots.**

Palos Verdes sold some of its lots at a public auction sale in January, 1944, about six weeks after petitioner acquired its subsidiary (Tr. p. 452). On these sales, petitioner realized a net profit of 33% (\$16,185—Tr. p. 481) on its total cost of acquisition of Palos Verdes (\$11,850—Ex. BB).

The program outlined in the November 25th letter, for sale of the lots over a long period of time, was frustrated because of the terms of an interlocutory decree entered in a Superior Court action in Los Angeles County, which prevented payment of delinquent

taxes against the lots over a five-year period as planned by petitioner (Tr. pp. 453, 491). At the time of acquisition, petitioner did not know that the interlocutory decree prevented these long-term amortization payments (Tr. pp. 405-406, 453). Petitioner's president naturally assumed that the same payment privileges attached to the property tax assessments under the decree as would have been in effect if the taxes had been wholly valid, but the County Assessor ruled otherwise (Tr. pp. 453, 491).

The testimony of Mr. Lane in this respect was not contradicted, although three potential sources of proof were available to respondent had he intended to dispute the fact. These sources were Mr. Archer (who caused tax suit to be commenced), Mr. Haggott (the president of Palos Verdes at the time the suit was filed), and the attorney who represented Palos Verdes in the suit. Archer testified as petitioner's witness and Haggott was called by respondent, but neither witness disputed Mr. Lane's testimony (Tr. pp. 204-205, 258-259, 585-596). The attorney did not testify.

2. **Petitioner caused Palos Verdes to replace its lots with other properties calculated to afford petitioner the same outlet for its products and for expansion of its activities.**

As shown, the November 25th letter of Mr. Lane to petitioner's board of directors outlined a comprehensive program for the use of Palos Verdes as a subsidiary for the expanded development of, and as an additional outlet for, petitioner's products. Among other things, the petitioner's president proposed (Ex. 20):

“ . . . that the American Pipe & Steel Corporation purchase the Palos Verdes Estates, Inc. for the purpose of handling all of American Pipe’s activities outside of the actual fabrication of steel products. I propose that a Board of Directors be elected which has the experience and ability to engage the company in the real estate business and any other profitable activities which will directly or indirectly benefit the American Pipe & Steel Corporation.”

Petitioner’s business purposes in acquiring Palos Verdes were demonstrated by the fact that petitioner actually carried out the proposal of its president. Although the original Palos Verdes lots were either sold or were lost under the tax decree, Palos Verdes Estates, Inc., as petitioner’s subsidiary, did acquire considerable other property which was utilized to further petitioner’s business (Tr. pp. 451, 464-468).

The Tax Court recognized that petitioner’s subsequent use of Palos Verdes was corroborative of petitioner’s purpose in acquiring the subsidiary. Thus, the record shows the following occurred during the presentation of this evidence (Tr. pp. 465-466):

“Mr. Chase: If the Court please, I am going to object What materiality does the question along this line have?

“Mr. Baird: Well, it has great materiality because part of our case is to show that Palos Verdes Estates, Inc., was not acquired merely as a subterfuge for taxes. We are endeavoring to show the facts here that this was a legitimate genuine business enterprise in 1943 and that the use of it, *the use of the company since that time, corroborates that view.*

“The Court: That is the way I understand it. If you are objecting, the objection is overruled.”

Notwithstanding the Court's observation at the time, in reaching its decision the Tax Court completely ignored these facts. Petitioner's subsequent utilization of Palos Verdes in these respects was not given the slightest mention in the “Findings of Fact” (Tr. pp. 49-75). The conclusion of the Tax Court was expressly made, “On the basis of the foregoing facts” (Tr. p. 75); that is, upon those facts, and those facts only, which were set forth in the findings.

The uncontradicted testimony of Mr. Lane, as to Palos Verdes' acquisition and operation of additional properties in furtherance of petitioner's business, was as follows (Tr. pp. 450-451):

“Q. . . . You testified yesterday that your main objective or at least one of your main objectives in acquiring Palos Verdes Estates, Inc. was because it had tremendous potential value for real estate purposes. Now, I will ask you whether or not you were able to develop the Palos Verdes Estates, Inc. for real estate purposes after you acquired the stock?

“A. That was the main plan that we had to develop it, to develop the sales of the lots of Palos Verdes Estates and add other . . . real estate properties to it. This has already been testified to that some of the lots were sold and some lots were lost under a tax decree . . . But during the period that I was connected with Palos Verdes Estates, Inc. we did add considerable properties to it. Palos Verdes Estates did buy some houses.”

And further (Tr. pp. 464-468):

“A. In line with the real estate business they bought four acres in Bakersfield and rented that.

...

“A. . . . They purchased or leased the land . . . [on which] Palos Verdes built . . . a bulk gasoline station. . . .

“Q. . . . Now, Mr. Lane, referring to the bulk stations about which you are now testifying, will you tell us when you installed those bulk stations?

“A. . . . I believe it was in 1944. . . .

“Q. Now, did you own these bulk plants?

“A. Palos Verdes built two and they leased them. I believe it was leased on an eight or nine-year basis . . . It was a business investment of Palos Verdes and it also brought American Pipe and Steel Corporation the tank business that was involved. The one station at Firebaugh was built at a cost of about . . . \$29,000 . . .

“Q. Did you have a bulk plant at San Diego?

“A. Yes, there was one built at San Diego.

...

“Q. And when was that?

“A. About the same time that Firebaugh, a little bit after. It was either 1944 or 1945 . . .

“Q. And did Palos Verdes operate that plant?

“A. No, they leased that plant; it was also one that was built for investment.

“Q. Can you state whether or not these operations have been profitable to Palos Verdes?

“A. Yes, they were.”

As stated, this evidence was not mentioned in the findings of fact and the Tax Court expressly based

its conclusion upon only such facts as were set forth in the findings (Tr. p. 75), notwithstanding the fact that the evidence was not disputed and the Court recognized its materiality.

3. In furtherance of petitioner's plans for expansion of its oil-well equipment business, Palos Verdes acquired profitable oil leases.

One of the plans advanced in Lane's letter of November 25th was stated as follows (Ex. 20):

"(2) In connection with our oil well equipment business, we have often seen competitors take leases and also purchase real property outright, thereby being in a position to tie in the sale of their oil field equipment with the leasing of the properties to the oil companies. This is quite an old procedure in California and Texas, and if we owned Palos Verdes, oil properties could be taken by them for leases or sub-leases to oil companies who would use American Pipe's products."

The evidence shows that petitioner also carried out this program (Tr. pp. 462-464). Again, however, this evidence was not mentioned in the Tax Court's findings (Tr. pp. 49-75), although the evidence was without dispute and the Court recognized its materiality (Tr. p. 466).

The testimony ignored by the Court was as follows (Tr. pp. 462-464):

"Q. Now, also, one of the reasons that has been stated is that you could use it to some advantage in connection with your oil well equipment business. Now, in what respects would that be an advantage to you?

“A. . . . We would take the leases on structures that we were familiar with and then lease or sublease those leases to friendly oil companies who would use our equipment. In some instances, we have had opportunities to buy land before the companies got into there to do the leasing and that ran up the price in many instances. In those instances, we, when we would obtain the land, we would be the landowner and we would lease to the other company.

“ . . . Palos Verdes did take over a lease . . . called the Cat Canyon lease . . . and Palos Verdes leased one-half interest to Fletcher Oil Company and they went in as a joint venture on the other half interest.

“The first well on that property came in for several hundred barrels a day . . .

“Q. Was that profitable for Palos Verdes Estates?

“A. Very.”

Mr. Lane also testified that Palos Verdes took other oil leases (Tr. p. 477).

4. Palos Verdes also leased and operated an oil refinery in order to effectuate petitioner's plans for expansion of its oil equipment business.

In furtherance of petitioner's purpose of acquiring and using a profitable subsidiary, Palos Verdes leased an oil refinery in Bakersfield, California, in December, 1943, or January, 1944, and thereafter it profitably operated the refinery (Tr. p. 476). The purpose of this operation was both to make money and to prove out some new equipment developed by petitioner (Tr. p. 464).

As the Tax Court itself recognized (Tr. p. 466), these facts further demonstrated that petitioner's acquisition of Palos Verdes was motivated by sound business reasons. Nevertheless, the Tax Court failed to give any consideration to such facts in arriving at its decision (Tr. pp. 49-75).

The testimony of petitioner showed that (Tr. p. 464):

"The refinery . . . was leased . . . for the purpose of making money in the first place and the second was to prove out some, well, they are what we call bubble caps. In a refinery, you have towers that are part of the refining process and inside of the towers is what we call bubble caps. Our engineers had figured out a type of bubble cap and heat exchanger, used with a heat exchanger produced by National Tank Company, and it was something that we wanted to explore the value of. So we had a two-fold purpose. One was to prove up the equipment and the other was to make money in the first place. And that was a profitable venture, too."

This testimony was not attacked by respondent.

5. In addition, petitioner's oil equipment business was promoted by Palos Verdes' acquisition of a boat for charter to oil companies engaged in geological work off the Coast.

The Tax Court's findings of fact also ignore the following testimony of Mr. Lane (Tr. pp. 468-469):

"Q. Now, will you tell us what other line of endeavor did Palos Verdes engage in?

"A. Palos Verdes invested in a boat for charter work to oil companies.

“Q. . . . what kind of boat was it?

“A. It was a mine sweep and was purchased from the United States Government . . .

“A. . . . At the time that boat was purchased a number of oil companies were doing geophysical work off the coast of Southern California in anticipation of the United States Department of the Interior leasing offshore lands . . .”

This testimony was also undisputed. The Tax Court's failure to consider this testimony, however, is demonstrated by the fact that it expressly based its conclusion upon only the evidence stated in its findings of fact (Tr. p. 75).

6. **Acquisition of Palos Verdes provided a highly profitable outlet for disposal of Chemical Warfare containers when the original plan for their use could not be carried out.**

Petitioner had been one of the original developers of equipment for private liquefied gas systems, and that was a rapidly growing and very lucrative business (Ex. 34; Tr. p. 471). A number of gas distributors were customers of petitioner's equipment (Tr. p. 471). The gas distributors were making good profits and petitioner wanted to use Palos Verdes to get into the distributing end of the business without showing open competition with petitioner's own customers (Tr. p. 471).

When the Chemical Warfare Service contract was terminated, petitioner had 800 or 900 of the tank containers on hand (Tr. p. 472).

In his letter of November 25th to petitioner's board of directors, Mr. Lane stated (Ex. 20):

“You are also familiar with the fact that we have often considered informally starting the distribution of liquefied gases to enhance the volume of containers. If we were to acquire Palos Verdes, a number of the lots could be set aside for development and containers would be furnished the purchasers of houses in the area, and Palos Verdes could distribute liquefied gas instead of running gas lines to the areas which do not have gas lines. This particular area would be a very good one in which to start the distribution of liquefied gases because there are approximately 20,000 acres undeveloped in which natural gas lines have not yet been laid. During the next 10 or 15 years a good part of this property is likely to be developed and built up.”

The letter proposed that petitioner (Ex. 20):

“... sell to Palos Verdes all of the rejected containers from the Chemical Warfare Contract at a price above what we have been offered by the junk dealers.

“This would enable Palos Verdes to enter into the distribution of L. P. Gas.”

Mr. Lane's judgment proved to be sound, as butane gas is being used in the Palos Verdes area (Tr. p. 558).

The tank containers were sold to Palos Verdes for \$15,000 (Tr. p. 472), which was about double the cost to petitioner (Tr. p. 474). It developed, however, that the containers could not be used for the intended purpose, first, because they were to be used as a tie-in on a building deal to sell the lots and

that plan was frustrated by the tax suit decree and, second, because there was then an acute gas shortage in the area which prevented Palos Verdes from starting up in the distribution business (Tr. p. 473). Accordingly, the containers were converted into dredging pipe, propane tanks and chlorine tanks and were resold at a profit of from \$80,000 to \$125,000 (Tr. pp. 473-474).

C. EXPERIENCE HAS DEMONSTRATED THE GOOD FAITH AND SOUND JUDGMENT OF PETITIONER IN MAKING ITS DECISION TO ACQUIRE THE PALOS VERDES LOTS.

On December 2, 1943, the same date that Palos Verdes was acquired by petitioner, Mr. Lane worked out computations showing how a net profit of \$350,000 could be made on the sale of the lots on a long-range development program. (Ex. 24; Tr. pp. 417-418).

Subsequent events have proved that these calculations were very conservative; that the profits to be made on such lots were simply fantastic.

In 1947, when the unredeemed lots were sold at the tax sale, Mr. Lane personally purchased as many of them as he could afford (Tr. p. 454); he bought about 197 lots (Tr. p. 455) and now owns almost 300 of them (Tr. p. 456). The lots were not reacquired by petitioner or Palos Verdes because the Government had made its income-tax audit and had then taken the position that petitioner could not have a subsidiary which was in the real estate business (Tr. pp. 457, 459).

Of the lots now owned by Lane, he has been offered \$90,000 for 75 lots and \$150,000 for the remainder; those are wholesale prices offered by responsible real estate builders who are already building in Palos Verdes (Tr. p. 456). The first offer amounts to about \$1,200 per lot and the second one is about \$800 a lot (Tr. p. 456). Lane did not accept the offers because they are too low (Tr. pp. 456-457).

Lane's testimony as to these values was not only undisputed, but it was fully substantiated by the testimony of Howard Towle. The latter is a real estate broker residing in Palos Verdes (Tr. p. 530). He started in the real estate business there in 1921 and has been familiar with the area ever since (Tr. p. 531).

In substance, Mr. Towle's testimony shows that lots in the Palos Verdes area were worth \$1,200 to \$2,250 by 1948 or 1949 (Tr. pp. 543-545). Some lots in that area are now valued at \$3,500 (Tr. pp. 532, 546). A house purchased for \$12,500 in 1942 was sold for \$47,500 in 1950 and is now offered for sale for \$65,000 (Tr. p. 550). In 1954, an undeveloped tract of 73 lots in the area was sold for \$110,000 (Tr. pp. 551-552).

In overruling an objection while Mr. Towle was testifying, the Tax Court stated (Tr. p. 539):

“In a matter involving value, subsequent facts can be introduced to show corroboration.”

Notwithstanding its recognition of the materiality of this evidence, the Tax Court refused to give any consideration to it in reaching its conclusion. No mention was made of this evidence in the findings of fact

other than a brief statement to the effect that Mr. Lane bought lots at the 1947 tax sale (Tr. p. 65). And, as shown, the Court's conclusion was based solely upon the facts stated in the findings (Tr. p. 75).

D. PETITIONER ESTABLISHED THAT IT HAD NO MOTIVE WHATEVER FOR THE ACQUISITION OF PALOS VERDES AS A "TAX LOSS" CORPORATION, IN THAT PETITIONER HAD NO LARGE PAST, PRESENT OR PROSPECTIVE PROFITS OR HIGH-EARNING ASSETS.

Petitioner's president testified without contradiction that petitioner:

"... was a small company. And ... had a record of losing money for a number of years, back in 1929, ten or eleven or twelve years." (Tr. p. 338.)

Petitioner's earnings in 1940, 1941 and 1942 were small (Jt. Ex. 40-C; Tr. p. 482). Petitioner had no record of large earnings or high earnings assets and it had no reason to anticipate it would have large profits or high taxes in the future. Accordingly, there was no showing that petitioner needed a "tax loss" corporation to offset actual or prospective profits.

Petitioner acquired the capital stock of Palos Verdes Estates, Inc., on December 2, 1943 (Tr. pp. 164-165). As of that date, petitioner had the trivial total of \$850 in Government prime ("war") contracts (Ex. 31).

The record further shows that petitioner had no prospects of receiving substantial war contracts in the

future. Other than the Chemical Warfare Service contract hereinafter mentioned, petitioner had never received any large war contract. The largest such contract awarded to petitioner in 1943 amounted to only \$32,369.76 (Ex. 31). Petitioner did not receive any large contracts thereafter until May 12, 1944, when it was awarded a contract for \$140,400 (Ex. 44).

Petitioner's commercial sales were likewise small. Its income tax return for the year 1943 showed a net profit of only \$16,880.52 (Tr. p. 52).

In September, 1942 (one year and two months before it acquired Palos Verdes), petitioner was awarded a contract by the Chemical Warfare Service which amounted to approximately \$3,500,000 (Tr. p. 484). However, this contract was terminated by the Government (for its convenience) on September 29, 1943 (Ex. 27; Tr. pp. 419-420). Thus, *the only substantial war contract which petitioner had ever obtained was cancelled over two months before petitioner acquired the stock of Palos Verdes*. The cancellation of this contract left petitioner with a backlog of but \$850 in war contracts (Ex. 31).

It was demonstrated, therefore, that petitioner had no motive whatever for acquiring Palos Verdes as a "tax loss" device.

On the contrary, it was affirmatively shown, without conflict, that petitioner was motivated solely by legitimate business purposes in the acquisition of Palos Verdes. Petitioner's predominant motive for the acquisition, at a time when no substantial profits

were in view, was the long-range program outlined in the letter of petitioner's president, herein set forth (Ex. 20). And when it appeared that petitioner would sustain a loss of \$350,000 to \$600,000 by reason of the termination of the Chemical Warfare Contract (Tr. pp. 373-374), petitioner's president, Mr. Jack Lane, believed that a program could be undertaken with the real estate owned by Palos Verdes which would make a profit of \$350,000, thus offsetting the anticipated loss from the contract cancellation (Ex. 24; Tr. p. 418).

Not only was this evidence uncontradicted, but respondent made no effort to dispute it.

SPECIFICATION OF ERRORS.

It is respectfully submitted that the Tax Court erred:

1. In holding that there are deficiencies in income and excess profits taxes due from petitioner for the taxable years 1944, 1945, and 1946.

2. In holding that Section 129 of the Internal Revenue Code of 1939, as amended, is applicable under the evidence herein.

3. In holding that the petitioner was not entitled to file consolidated tax returns, and to secure the benefits of such returns, pursuant to Section 141 of the Internal Revenue Code of 1939.

4. In failing to find or determine that petitioner did not acquire the stock of Palos Verdes Estates,

Inc., for the principal purpose of evading or avoiding Federal income or excess profits taxes within the meaning of Section 129 of the Internal Revenue Code of 1939, as amended.

5. In failing to find or determine whether the acquisition of the stock of Palos Verdes Estates, Inc., by petitioner was or was not made for the principal purpose of evading or avoiding of Federal income or excess profits taxes by securing the benefit of a deduction, credit or other allowance which petitioner would not otherwise enjoy.

6. In failing to make any findings of fact with regard to petitioner's intent and purpose in acquiring the stock of Palos Verdes Estates, Inc.

7. In holding that the determination by the Commissioner as to petitioner's intent and purpose in acquiring said stock was entitled to be weighed and considered in determining the sufficiency of the evidence produced by petitioner on that issue.

8. In holding that the determination by the Commissioner relieved him of the duty to rebut or overcome the evidence produced by the petitioner.

9. In resting its holding and conclusion that petitioner had not sustained its burden of proof solely upon the determination of the Commissioner that petitioner's principal purpose in acquiring the stock of Palos Verdes Estates, Inc., was the evasion or avoidance of Federal income or excess profits taxes within the meaning of Section 129 of the Internal Revenue Code of 1939, as amended.

10. In that its findings of fact are not supported by substantial evidence or by the weight of the evidence, and are clearly erroneous.

11. In that its opinion and decision is contrary to law and the Regulations and is not supported by the evidence or by the findings of fact.

SUMMARY OF ARGUMENT.

I. The Tax Court erroneously based its decision wholly upon an absent presumption in favor of respondent's determination.

A. The decision was expressly predicated upon the inapplicable presumption.

B. The Tax Court erred in relying upon the presumption.

C. The Tax Court failed to give any consideration to the merits of the case independently of respondent's determination.

II. The Tax Court erroneously failed to consider material and undisputed evidence comprising a substantial part of petitioner's case.

III. The findings of the Tax Court do not support its conclusion.

A. The Tax Court failed to find any ultimate facts which would sustain its conclusion.

B. The evidentiary findings made by the Tax Court sustain the contrary conclusion.

IV. The decision of the Tax Court is not supported by the evidence.

A. Petitioner affirmatively established that it did not acquire Palos Verdes for the principal purpose of avoiding taxes.

B. The presumption in favor of respondent's ruling has no probative force.

C. The Tax Court could not disregard petitioner's undisputed evidence.

ARGUMENT.

I.

THE TAX COURT ERRONEOUSLY BASED ITS DECISION WHOLLY UPON AN ABSENT PRESUMPTION IN FAVOR OF RESPONDENT'S DETERMINATION.

A. The decision was expressly predicated upon the inapplicable presumption.

Petitioner's case established that it did not acquire Palos Verdes for the principal purpose of evading or avoiding Federal income or excess profits taxes; hence, Section 129 of the Internal Revenue Code was inapplicable and petitioner was entitled to exercise its privilege of filing consolidated tax returns.

As has been shown, petitioner proved (a) that it acquired Palos Verdes for business purposes; (b) that petitioner thereupon used Palos Verdes as a profitable subsidiary in carrying out those business purposes; (c) that petitioner exercised sound business judgment in purchasing Palos Verdes; and (d) that

petitioner could not have been motivated principally or to any extent by tax considerations, as it had no high earning assets nor did it have any large past, present or prospective profits.

Other than reciting some of the evidence, the Tax Court failed to make any findings of its own with respect to any of these facts. Instead, the Court relied entirely on a presumption that respondent's determination was correct. Such reliance is shown by the language used by the Tax Court. After referring to some of the evidence, the Court concluded its "Findings of Fact" by stating (Tr. p. 75):

"On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred . . ."

The Court's complete reliance upon the Commissioner's determination was re-emphasized at the end of the "Opinion" portion of the decision (Tr. p. 79):

"The Commissioner having determined that the tax benefit to be gained was the principal purpose behind the acquisition, it was petitioner's burden to prove that such determination was erroneous. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof."

B. The Tax Court erred in relying upon the presumption.

The fundamental errors in the ruling of the Tax Court, quoted above, are as follows:

First: Petitioner's burden of overcoming the presumption in favor of respondent's determination was satisfied upon petitioner's introduction of substantial

evidence tending to prove that the determination was incorrect. Plainly, petitioner did produce such evidence and the Tax Court erred in concluding otherwise.

Second: Petitioner having produced substantial evidence contrary to respondent's determination, the presumption of its correctness had vanished, and the Tax Court erred in giving any consideration to that determination.

Third: The Court erroneously gave weight to a presumption which had no probative force.

Fourth: Petitioner having made out at least a prima facie case, it was the duty of the Tax Court to make its own findings and to reach its own conclusion on the evidence. In failing to do so, the Court erred.

It is true that there is a presumption of the correctness of the Commissioner's determination of a tax deficiency. But the presumption is a presumption of law affecting only the burden of proof. It is not an inference of fact. It has no probative force. The effect of the presumption is merely to require the taxpayer to present some substantial evidence contradicting it. When such evidence is introduced, the presumption disappears from the case. Otherwise stated, the taxpayer has caused the presumption to disappear when he has introduced evidence which would support a contrary finding.

The foregoing principles are established by many decisions. Thus, in *Crude Oil Corp. v. Commissioner* (1947, 10th Cir.), 161 F.2d 809, 810, it was said:

“The presumption of the correctness of the Commissioner’s finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced.”

In *J. M. Perry & Co. v. Commissioner* (1941, 9th Cir.), 120 F.2d 123, 124, this Court pointed out that the Commissioner’s ruling:

“. . . is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issue depends wholly upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof.”

This concept was similarly stated in *Belyea’s Estate v. Commissioner* (1953, 3rd Cir.), 206 F.2d 262, 265-266:

“Of course, the presumption of the correctness of the Commissioner’s ruling which imposes this burden of proof on the challenging taxpayer has no probative force as evidence to offset or rebut the taxpayer’s proof.”

The ruling of the Tax Court herein was almost identical to the following finding of the Board of Tax Appeals in *Hemphill Schools, Inc., v. Commissioner* (1943, 9th Cir.), 137 F.2d 961, 963:

“The evidence does not overcome the determination of respondent that petitioner was

availed of for the purpose of preventing the imposition of surtax upon its shareholders by permitting gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed. Accordingly, we sustain the respondent.”

Upon the principles stated above, this Court reversed the decision of the Board, pointing out that (137 F.2d at 964):

“Evidence *was* produced. Some of the evidence produced by petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, the presumption ceased, and thenceforth the issue depended ‘wholly upon the evidence.’ It thus became the duty of the Board to find from the evidence, and from it alone, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the presumption (which no longer existed) as if it were evidence, weighed it against petitioner’s evidence and concluded that petitioner’s evidence did not ‘overcome’ it.”

Evidence *was* produced here also. Some of the evidence produced by petitioner at least tended to prove that it did not acquire Palos Verdes for the principal purpose of evading or avoiding income or excess profits taxes. Evidence having been so produced, the presumption ceased, and thenceforth the issue depended wholly upon the evidence. It thus became the duty of the Tax Court to find from the evidence,

and from it alone, whether petitioner's principal purpose in acquiring Palos Verdes was the evasion or avoidance of taxes. No such finding was made. Instead, the Tax Court treated the presumption (which no longer existed) as if it were evidence, weighed it against petitioner's evidence, and concluded that petitioner's evidence did not overcome it.

The great stress placed by the Tax Court upon respondent's determination is shown by its conclusion (Tr. p. 79):

"The Commissioner having determined that the tax benefit to be gained was the principal purpose behind the acquisition, it was petitioner's burden to prove that such determination was erroneous. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof."

By this conclusion, the Court erroneously ruled in effect that petitioner had failed to produce any substantial evidence in support of its position. This is true because, as shown, petitioner's burden of overcoming respondent's determination is satisfied upon the presentation of such substantial evidence. Therefore, the Tax Court's ruling here is no different than the following conclusions of law held erroneous in *Wiget v. Becker* (1936, 8th Cir.), 84 F.2d 706, 707:

"1. That no substantial evidence has been introduced which will support a judgment for the plaintiff.

"2. That plaintiff has failed to sustain the burden of proof resting upon her to establish

the illegality of the collection by the defendant of the tax sought to be recovered.

“3. That plaintiff has failed to overcome the prima facie case as established by the assessment duly made by the Commissioner of Internal Revenue.”

As stated by the Court of Appeals in reversing the judgment entered on those conclusions of law:

“It is apparent from the conclusions of law entered by the lower court that great stress was placed upon the presumption of correctness of the determination by the Commissioner; . . . The presumption, however, is a rebuttable one, and will only support a finding in the absence of any substantial evidence to the contrary.”

(*Wiget v. Becker, supra*, 84 F.2d at 707-708.)

C. The Tax Court failed to give any consideration to the merits of the case independently of respondent's determination.

Petitioner having proved at least a prima facie case, it became the duty of the Tax Court to find from the evidence, and from it alone, whether petitioner's principal purpose in acquiring the stock of Palos Verdes was the evasion or avoidance of income or excess profits taxes.

Hemphill Schools, Inc. v. Commissioner, supra,
137 F.2d 961, 964.

The Tax Court failed to make any findings on this issue. It did not find what the principal purpose of petitioner was in acquiring Palos Verdes. No findings at all were made as to any ultimate facts in the case.

The Tax Court's failure to consider the merits of the case, independently of respondent's determination, is shown by its disorganized recital of some of the evidence in its "Findings of Fact." No attempt was made to analyze such evidence or to consider its effect. Much of the evidence so recited has little, if any, relevance to the primary issues. Evidence which was of great importance to the case, on the other hand, was entirely omitted.

Thus, no mention was made in the findings of much of the evidence heretofore reviewed in the Statement of the Case, although the Tax Court recognized the significance and importance of such evidence at the time it was admitted (Tr. pp. 466, 549). The Tax Court failed to consider or mention the evidence that petitioner caused Palos Verdes to replace its lots with other properties calculated to afford petitioner with the same outlet for its products and for expansion of its activities. (Statement of the Case, point B 2, above). No consideration was given to the evidence that, in furtherance of petitioner's plans for expansion of its oil equipment business, Palos Verdes acquired profitable oil leases, leased or operated an oil refinery, and acquired and used a boat for charter work to oil companies (Statement of the Case, points B 3, 4 and 5). Neither did the Tax Court consider the established fact that subsequent events have demonstrated the sound nature of petitioner's business judgment in acquiring the Palos Verdes lots (Statement of the Case, point C, above).

The opinion of the Tax Court also shows that it did not undertake to fulfill its duty of independently determining the case on its merits. Unlike the situation in such cases as *Gillette's Estate v. Commissioner* (1950, 9th Cir.), 182 F.2d 1010, the Tax Court's opinion here does not contain any discussion, analysis or enumeration by the Court of any reasons or grounds for its decision. The evidence was neither reviewed nor analyzed. A few of the points established by petitioner's case were mentioned but were not determined (Tr. pp. 77-78). Instead, the decision is rested entirely upon respondent's determination of tax deficiencies (Tr. p. 79).

It is apparent that, in this instance, the Tax Court completely abdicated its duties and functions as a Court. In effect, its functions were delegated in full to the Commissioner. The presumption of the correctness of respondent's determination (a presumption of law relating solely to the burden of proof) was treated as if it had great probative force. The presumption, in fact, was given virtually conclusive effect.

The error of the Tax Court, in failing to give any independent consideration to the case, effectively deprived petitioner of its right to a trial by a court of law on the matters involved in the administrative determination of the Commissioner. It is respectfully submitted, therefore, that the decision of the Tax Court must be reversed.

II.

THE TAX COURT ERRONEOUSLY FAILED TO CONSIDER MATERIAL AND UNDISPUTED EVIDENCE COMPRISING A SUBSTANTIAL PART OF PETITIONER'S CASE.

The Statement of the Case herein (point B) sets forth at length the evidence showing that, upon acquisition of Palos Verdes, petitioner utilized it as a profitable subsidiary. Such evidence established the following points:

Petitioner caused Palos Verdes to replace its lots with other properties calculated to afford petitioner the same outlet for its products and for expansion of its activities (Statement of the Case, point B 2).

In furtherance of petitioner's plans for expansion of its oil-well equipment business, Palos Verdes acquired profitable oil leases (Statement of the Case, point B 3).

Palos Verdes also leased and operated an oil refinery in order to effectuate petitioner's plans for expansion of its oil equipment business (Statement of the Case, point B 4).

In addition, petitioner's oil equipment business was promoted by Palos Verdes' acquisition of a boat for charter to oil companies engaged in geological work off the Coast (Statement of the Case, point B 5).

Furthermore, subsequent experience has demonstrated the good faith and sound business judgment of petitioner in making its decision to acquire the Palos Verdes lots (Statement of the Case, point C).

The Tax Court expressly recognized the materiality of this evidence as corroborative of petitioner's business purposes in making the acquisition (Tr. pp. 466, 539), and the evidence was not contradicted. Nevertheless, in reaching its decision, the Tax Court wholly failed to give any consideration to these facts. The foregoing evidence was not mentioned in the "Findings of Fact" (Tr. pp. 49-75) and, in concluding this portion of its decision, the Tax Court stated (Tr. p. 75):

"On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred . . ." (Emphasis supplied.)

Thus, the Court's conclusion was expressly based upon only the "foregoing facts"; that is, upon only such evidence as was actually set forth in the "Findings of Fact."

It is demonstrated, therefore, that the Tax Court made its decision without any consideration of the undisputed evidence, reviewed above, constituting a substantial part of petitioner's case. The evidence ignored will not admit of the determination made by the Commissioner. It is the evidence in which the presumption of the correctness of the Commissioner's determination dissolves. It is the evidence which, together with the facts acknowledged by the Tax Court, proves the purpose of the petitioner in its acquisition of Palos Verdes.

Under these circumstances, it is respectfully submitted that the decision must be reversed.

III.

**THE FINDINGS OF THE TAX COURT DO NOT
SUPPORT ITS CONCLUSION.**

The decision of the Tax Court, in substance, was that petitioner had failed to produce any substantial evidence tending to overcome respondent's determination of tax deficiencies (Tr. pp. 75, 79). But such decision does not find support even in the incomplete (and, therefore, misleading) findings of fact made by that Court for these reasons:

A. The Tax Court failed to find any ultimate facts which would sustain its conclusion.

As stated, the Tax Court's "Findings of Fact" consist simply of a recital of some evidence. No ultimate or conclusionary facts were found. No findings were made which would lead to, or provide support for, the decision of the Tax Court.

It was not found that petitioner's principal purpose in acquiring the stock of Palos Verdes was the evasion or avoidance of income or excess profits taxes. Indeed, no ultimate finding at all was made relative to any purpose, principal or otherwise, of petitioner in acquiring Palos Verdes. The Tax Court did not make any conclusionary findings of fact as to the business purposes expressed by petitioner for this acquisition or as to the business purposes for which petitioner utilized its subsidiary. The Court did not even mention most of the uncontradicted evidence of petitioner as to the means by which it used Palos Verdes to carry out petitioner's business purposes.

B. The evidentiary findings made by the Tax Court sustain the contrary conclusion.

Such material evidence as was actually mentioned in the "Findings of Fact" does not lead to the Tax Court's decision, but sustains the contrary conclusion; that is, that petitioner did *not* acquire Palos Verdes for the principal purpose of evading or avoiding income or excess profits taxes.

Thus, the findings contain a recital of the November 25th letter of petitioner's president and the action of petitioner's board of directors thereon, pursuant to which petitioner acquired the Palos Verdes stock (Tr. pp. 67-73). Such evidence demonstrates that legitimate business purposes motivated petitioner's acquisition of Palos Verdes by proper corporate action duly taken (Statement of the Case, point A, above). Yet the Tax Court did not find that petitioner's purposes were not as set forth in such corporate action.

The evidentiary findings also show the following (Tr. pp. 66-67, 74-75):

That petitioner's Chemical Warfare Service contract was terminated by the Government more than two months prior to the acquisition of Palos Verdes; that petitioner had invested large amounts in preparing to perform and in performing that contract; that it had assigned its accounts receivable to the bank to secure a huge loan necessitated by the contract; that petitioner, therefore, was without operating funds; that petitioner was then facing a tremendous loss as a result of the termination of the

contract; that the negotiations with the Government finally resulted in a loss of \$116,240.30 to petitioner due to the contract termination; that petitioner's total backlog of war contracts in December, 1943 was only \$850; and that petitioner did not receive any substantial war contracts thereafter until on or about July 15, 1944, some eight months after Palos Verdes was acquired.

Again such evidence does not lead to or sustain the decision reached by the Tax Court. To the contrary, the evidence shows that petitioner could not have been motivated by tax considerations because it did not have any high-earning assets or large past, present or prospective profits.

Other evidentiary findings, although incomplete, similarly fail to sustain the Court's conclusion.

The findings state, for example, that the tank containers were disposed of by Palos Verdes at a large profit (Tr. p. 74), although no direct mention is made of the reasons why the original plan for use of such containers could not be carried out (Tr. p. 473).

While the Tax Court found that Palos Verdes made no improvements on its properties (Tr. p. 73), the findings elsewhere show why that was not done. As the Court found (Tr. pp. 64-65), most of the lots were sold and the balance were lost under the tax suit decree. It was also noted in the findings that petitioner's accounts receivable had been assigned to the bank to secure the loan necessitated by the Chemical Warfare contract, that said contract had been termi-

nated, and that petitioner was without funds to pay off the property taxes (Tr. pp. 66-67).

In addition, Mr. Lane testified that, at the time of the acquisition of Palos Verdes, he did not know of the special provisions of the interlocutory decree in the tax suit limiting the period of redemption; it was this peculiar feature of the decree which frustrated his plan to pay the property taxes over a period of years (Tr. pp. 405-406, 453, 491). As has been shown, such testimony was not contradicted. No contrary finding was made by the Tax Court.

Upon such evidentiary findings as were actually made by the Tax Court, therefore, its decision is without support, and this is true even though such findings failed to consider or mention most of the material and undisputed evidence establishing petitioner's profitable utilization of Palos Verdes as a subsidiary to further petitioner's business interests.

IV.

THE DECISION OF THE TAX COURT IS NOT SUPPORTED BY THE EVIDENCE.

A. Petitioner affirmatively established that it did not acquire Palos Verdes for the principal purpose of avoiding taxes.

Not only was it shown that petitioner had no motive, purpose or reason for acquiring a "tax loss" corporation, as such, but petitioner affirmatively proved that it was prompted solely by sound business reasons in acquiring Palos Verdes (Statement of the Case, points A, B and C). Pursuant to the planned

program presented by its president in his November 25th letter, petitioner acquired Palos Verdes for the purpose of utilizing it as an effective and profitable subsidiary to further the business interests of petitioner, and the subsidiary was actually so used. The good business judgment exercised by petitioner in making such acquisition has been proved by the subsequent developments in the Palos Verdes area (Statement of the Case, point C, above).

Under such circumstances, petitioner was entitled to exercise its privilege of filing consolidated tax returns under §141 of the Internal Revenue Code, and §129 thereof was inapplicable. Section 129 disallows a tax benefit to the acquiring corporation only when "the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax . . ." That section has no application where, as here, the acquisition or reorganization was undertaken wholly or predominantly for legitimate business purposes.

Chelsea Products, Inc. (1951), 16 T.C. 840
(affirmed (3rd Cir.) 197 F. 2d 620);

Alcorn Wholesale Co. (1951), 16 T.C. 75;

Berland's Inc. of South Bend (1951), 16 T.C. 182;

J. E. Dilworth Co. v. Henslee (1951, M.D. Tenn.), 98 F. Supp. 957.

Even in cases where the acquisition or reorganization was expressly motivated, in part, by tax reasons, it has been recognized that §129 is inapplicable, the tax motives not being predominant.

Alcorn Wholesale Co., supra, 16 T.C. 75, 89;
Berland's Inc. of South Bend, supra, 16 T.C.
182, 188.

Petitioner herein had neither motive nor reason for seeking means of reducing income or excess profits taxes, and it did not do so. As has been shown (Statement of the Case, point D, above), when Palos Verdes was acquired on December 2, 1943, petitioner was a small company without any history or prospects of large profits or high earning assets. Its sole war contract of any substance had been cancelled some two months previously. With the cancellation of that contract, petitioner was faced with a huge loss. Its total backlog of prime contracts on the date of acquisition amounted to only \$850.

Nothing in petitioner's past, present or foreseeable future presented any particular problem with respect to income or excess profits taxes. To the contrary, petitioner's problem was to find means of earning profits and not to avoid taxes.

Petitioner's situation and acquisition did not come within the purpose, objective or intent of §129 of the Internal Revenue Code. In fact, petitioner's financial picture presented just the converse of the situation contemplated by that section.

The objective of §129, as shown by the committee reports, was to prevent the distortion through tax avoidance of the deduction, credit or allowance provisions of the Internal Revenue Code, *particularly those of the type represented by the practice of cor-*

porations with large excess profits acquiring corporations with current, past or prospective losses or deductions, deficits or current or unused excess profits credits, for the purpose of reducing income and excess profits taxes.

Commodores Point Terminal Corp. (1948), 11 T.C. 411, 415-416.

The Treasury Regulations also recognize that §129 was directed at an acquisition or transfer by a corporation “with large profits” or “high earning assets.” (26 C.F.R. 39.129-3 (b).)

Under the circumstances here, the Tax Court erred in upholding respondent’s determination of tax deficiencies and in thereby applying §129 to this case and in failing to hold or determine that petitioner was entitled to exercise its privilege of filing consolidated tax returns pursuant to §141 of the Internal Revenue Code.

B. The presumption in favor of respondent’s ruling has no probative force.

Petitioner having established at least a prima facie case showing (a) that it did not acquire Palos Verdes for the principal purpose of evading or avoiding taxes, and (b) that it did, in fact, make the acquisition for proper business purposes which were actually put into effect, the presumption of correctness of respondent’s determination ceased to exist, “and thenceforth the issue depended ‘wholly upon the evidence.’ ” (*Hemphill Schools, Inc. v. Commissioner*, supra, 137 F. 2d 961, 964.) When such evidence has been ad-

duced, "The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof." (*J. M. Perry & Co. v. Commissioner*, supra, 120 F. 2d 123, 124.) And, as stated in *Wiget v. Becker*, supra, 84 F. 2d 706, 707-708: "The presumption, however, is a rebuttable one, and will only support a finding in the absence of any substantial evidence to the contrary . . ."

It follows that the Tax Court's decision could not be rested, in whole or in part, upon respondent's determination. The Court was required to decide the case solely upon the evidence produced by petitioner and respondent.

C. The Tax Court could not disregard petitioner's undisputed evidence.

Respondent made no serious attempt to rebut the case established by petitioner, and he offered no competent evidence which tended to contradict that produced by petitioner on any material matter. The testimony of the four witnesses called by respondent was cursory only and did not tend to rebut any material fact proved by petitioner (Tr. pp. 571-575, 575-585, 585-596, 621-633).

It was shown without contradiction that petitioner's business purposes in acquiring Palos Verdes were as set forth in Mr. Lane's letter of November 25th and that petitioner actually utilized Palos Verdes to carry out those business purposes so far as possible. It was shown, further, that petitioner's inability to carry out

the program completely was due to the unusual provisions of the decree entered in the Palos Verdes tax suit, that such provisions were not known to petitioner at the time of the acquisition, and that petitioner did not have the funds to pay the property taxes in the short period of time available (Tr. pp. 405-406, 453, 491).

The business purposes of petitioner, therefore, were shown both by the direct and positive documentary evidence and also by the direct, positive and unimpeached testimony of petitioner's president. He was the man who best knew petitioner's purposes in making the acquisition and his testimony is consistent with every fact proved.

Under these circumstances, the Tax Court was required to accept petitioner's evidence. The situation here is the same as that involved in *Foran v. Commissioner* (1948, 5th Cir.), 165 F. 2d 705, 707, where it was said:

“Here there is direct and positive evidence from the witness who best knows, that this property was for eighteen months held as an investment and not held for sale to customers. His testimony is consistent with every proven fact. He gives a credible reason why it was not for sale and why finally in 1941 he did sell it. We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury.”

The Tax Court, in this case, did not find that petitioner's purposes in acquiring Palos Verdes were any-

thing other than as shown by the corporate documents introduced in evidence and the testimony of petitioner's president. No ultimate facts were found in regard to such matters. Instead, the "Findings of Fact" merely recite some of this evidence and the decision is then based solely upon the respondent's prior determination. Accordingly, the comment of the Court of Appeals in *Wright-Bernet v. Commissioner* (1949, 6th Cir.), 172 F. 2d 343, 346, is equally pertinent here:

"The Tax Court in its findings of fact adopted and reiterated the material evidence introduced by the petitioner, and then decided that the compensation of each employee for one year was unreasonable in the amount of \$140, and for the second year in a greater amount. As the petitioner's witnesses were qualified and unimpeached, and no evidence was given to the contrary, their testimony should have been accepted."

The record in the present case is also similar to that involved in *Crude Oil Corp. v. Commissioner*, supra, 161 F. 2d 809, 810, where the issue was whether or not a certain tax return had been filed in time. The petitioner's evidence in that case indicated that a return addressed to the Collector had been timely mailed. Reversing the decision of the Tax Court, it was said:

"The Tax Court did not find that the return was not filed within the statutory period. It merely held that the presumption of delivery was insufficient to overcome the presumption of correctness of the Commissioner's determination. We think the Tax Court fell into an error of law. The pre-

sumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."

Since respondent offered no competent evidence herein tending to disprove the case made out by petitioner,

"... the petitioner was denied the opportunity of examining the correctness of his computations; and was left to stand upon its own proof, none of which was refuted. Therefore, we think, the burden of presenting evidence to rebut any presumption in favor of the Commissioner's findings was fully met . . ."

(*R. P. Farnsworth & Co. v. Commissioner* (1953, 5th Cir.), 203 F. 2d 490, 492.)

The difficulty with respondent's position in this case is that it assumes the existence of a purpose which was not proved and which is contrary to both the documentary evidence and the uncontradicted testimony of petitioner's witnesses. In order to uphold respondent's position, such evidence must not only be regarded as wholly false, but it must also be held to prove *just the reverse*. As the Supreme Court commented in *U. S. v. American Bell Telephone Co.* (1896), 167 U.S. 224, 259:

"The difficulty with this charge of wrong is that it is not proved. It assumes the existence of a knowledge which no one had; of an intention which is not shown. It treats every written communication from the solicitor in charge of the application, calling for action, as a pretence, and

all the oral and urgent appeals for promptness as in fact mere invitation to delay. It not only rejects the testimony which is given, both oral and written, as false, but asks that it be held to prove just the reverse.”

Moreover, although relying upon the respondent's determination, the Tax Court did not make any finding in accordance with respondent's position herein. The Court did not find that petitioner's purposes in acquiring Palos Verdes were anything other than as shown by petitioner's oral and documentary evidence.

CONCLUSION.

We respectfully submit that the record in this case must be reviewed in the light of the fact that the Tax Court did not perform its function as a Court.

In this case the Tax Court did *not* weigh or evaluate the evidence, and it did *not* make any independent determination of the ultimate facts. The Tax Court, instead, rested its decision wholly upon respondent's determination. Consequently, any weight or regard which might otherwise be given the Tax Court's decision is not present here.

This is not a case, therefore, in which this Court is asked to review the evidence after the Tax Court has made its own review and determination. The case was never considered on the merits by the Tax Court. And if the Tax Court had considered the case on the merits, free of respondent's determination, it is ap-

parent that its decision must have been in favor of petitioner. Under the circumstances, it is respectfully submitted that the decision must be reversed.

Dated, San Francisco, California,
October 22, 1956.

Respectfully submitted,

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No. 15174

**In the United States Court of Appeals
for the Ninth Circuit**

AMERICAN PIPE & STEEL CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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INDEX

Opinion below	Page 1
Jurisdiction	1
Question presented	2
Statute and Regulations involved.....	2
Statement	2
Summary of argument	18

Argument:

The losses of Palos Verdes cannot, by means of consolidated tax returns, be offset by American Pipe against its gains	21
A. American Pipe was not entitled to file consolidated tax returns because of Section 129.....	21
1. Section 129 in general	21
2. American Pipe's principal purpose of acquiring control of Palos Verdes was to avoid federal income and excess profits taxes	26
(a) American Pipe's earnings compared with Palos Verdes' losses	26
(b) The offer of \$2 a share was 400 per cent higher than the going market price	33
(c) The loss was realized immediately after final acquisition.	34
3. The letter of November 25, 1943.....	36
4. The Tax Court's decision was based on an examination of the entire record..	37
B. Regardless of Section 129, American Pipe was not entitled to file consolidated tax returns...	39
Conclusion	47
Appendix	48

CITATIONS

Cases:

	Page
<i>Alcorn Wholesale Co. v. Commissioner</i> , 16 T.C. 75....	23, 24
<i>Alpha Tank & Sheet Metal Mfg. Co. v. United States</i> , 116 F. Supp. 721	25
<i>Alprosa Watch Corp. v. Commissioner</i> , 11 T.C. 240....	25
<i>American Pipe and Steel Corp. v. Commissioner</i> , 25 T.C. 351	1
<i>Berland's Inc. of South Bend v. Commissioner</i> , 16 T.C. 182	24
<i>Chelsea Products, Inc. v. Commissioner</i> , 16 T.C. 840, affirmed, 197 F. 2d 620.....	24
<i>Commodores Point Terminal Corp. v. Commissioner</i> , 11 14 T.C. 411	23, 24
<i>Ericsson Screw Machine Products Co. v. Commissioner</i> , T.C. 757	44
<i>Grenada Industries, Inc. v. Commissioner</i> , 17 T.C. 231, affirmed, 202 F. 2d 873, certiorari denied, 346 U.S. 819	45
<i>Gregory v. Helvering</i> , 293 U.S. 465	21
<i>Helvering v. Rankin</i> , 295 U.S. 123.....	39
<i>Hemphill Schools v. Commissioner</i> , 137 F. 2d 961.....	38, 39
<i>Higgins v. Smith</i> , 308 U.S. 473.....	21, 46
<i>Kimbell-Diamond Milling Co. v. Commissioner</i> , 14 T.C. 74, affirmed, 187 F. 2d 718.....	45
<i>Meadow Lamp & Imp. Co. v. Commissioner</i> , 124 F. 2d 297	39
<i>Montrose Cemetery Co. v. Commissioner</i> , 105 F. 2d 238	39
<i>New Colonial Co. v. Helvering</i> , 292 U.S. 435.....	45
<i>Spreckels, J. D. & A. B., Co. v. Commissioner</i> , 41 B.T.A. 370	35, 41, 42, 43, 46
<i>United States v. Real Estate Boards</i> , 339 U.S. 485.....	24
<i>United States v. Yellow Cab Co.</i> , 338 U.S. 338.....	24
<i>W A G E, Inc. v. Commissioner</i> , 19 T.C. 249.....	25
<i>Wisdom v. United States</i> , 205 F. 2d 30.....	24
<i>Woolford Realty Co. v. Rose</i> , 286 U.S. 319.....	21, 41

Statute:

Internal Revenue Code of 1939:

Sec. 45 (26 U.S.C. 1952 ed., Sec. 45)	48
Sec. 129 (26 U.S.C. 1952 ed., Sec. 129)	48
Sec. 141 (26 U.S.C. 1952 ed., Sec. 141)	50

Miscellaneous:

	Page
Federal Rules of Civil Procedure, Rule 52.....	23, 24
H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 55-56 (1944 Cum. Bull. 1059, 1070)	25, 46
7A Mertens, Law of Federal Income Taxation, 1954 Cum. Pocket Suppl., Sec. 42.145(a), pp. 299, 300.....	22, 46
9 Mertens, Law of Federal Income Taxation, Secs. 50.61, 50.62	39
Rudick, Acquisitions to Avoid Tax, 58 Harv. L. Rev. 196, 197, 199, 200-206 (1944)	21, 23, 24
Rules of Practice before the Tax Court of the United States, Rule 32	39
S. Rep. No. 627, 78th Cong., 1st Sess., pp. 58-60 (1944 Cum. Bull. 973, 1016-1017)	23, 25, 46
Treasury Regulations 111:	
Sec. 29.129-1	23, 51
Sec. 29.129-3	51

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*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 49-79) are reported at 25 T. C. 351.

JURISDICTION

This petition for review (R. 647-651) involves federal income and excess profits taxes for the taxable years 1944, 1945, and 1946. On March 31, 1950, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$213,776.38. (R. 28-29.) Within ninety days thereafter and on May 29, 1950, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272(a) of the Internal Revenue Code

of 1939. (R. 3, 7-27.) The decision of the Tax Court was entered February 28, 1956. (R. 80.) The case is brought to this Court by a petition for review filed May 22, 1956. (R. 647-651.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

The sole question is stated in the stipulation of facts to be whether American Pipe & Steel Corporation is entitled to the tax benefits which it claimed in the consolidated returns for 1944, 1945, and 1946, by reason of its acquisition of the entire stock of Palos Verdes Estates, Inc.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts of this case, some of which were stipulated or otherwise undisputed, are as follows:

The taxpayer is the American Pipe & Steel Corporation (hereinafter referred to as American Pipe), organized under the laws of the State of Nevada on May 27, 1929. It maintains its principal place of business in Alhambra, California. During the tax years, and to the date of this proceeding, it kept its books and filed its income tax returns on a calendar year basis. (R. 51.)

Palos Verdes Estates, Inc. (hereinafter called Palos Verdes), was organized under the laws of California on March 11, 1935. During the tax years it had its principal office in Alhambra, California. Prior to the acquisition of its capital stock by American Pipe, Palos Verdes used the fiscal accounting year ending on February 28. Effective from December 2, 1943, this fiscal

year was changed with permission of the Commissioner of Internal Revenue to the calendar year. (R. 51-52.)

American Pipe filed consolidated income tax returns for each of the years 1943, 1944, 1945, and 1946, in which returns were included the operations of Palos Verdes, as a wholly-owned subsidiary, beginning with the period December 3, 1943, to December 31, 1943. Such returns showed consolidated normal tax net income or losses, which were the result of consolidating the net income of American Pipe with the net losses of Palos Verdes, as follows (R. 52):

Taxable Year	American Pipe Net Income or (Loss)	Palos Verdes Net Income or (Loss)	Consolidated Net Income or (Loss)
1943.....	\$ 16,880.52	(\$245,800.74)	(\$228,920.22)
1944.....	96,515.44	(\$419,329.90)	(\$322,814.46)
1945.....	144,909.04	(\$272,164.94)	(\$127,255.90)
1946.....	316,644.17	(\$148,632.80)	\$168,011.37

The amounts stated in the Palos Verdes column and in the Consolidated column for the taxable year 1944, reflect a carry-over of claimed net operating loss of Palos Verdes for the period December 3, 1943, to December 31, 1943, deducted on the consolidated return filed for the year 1944 in the amount of \$215,639.88. The amounts stated in the Palos Verdes column and in the Consolidated column for 1945 and 1946 reflect carry-overs of claimed net operating losses for the first and second preceding years of Palos Verdes deducted on the consolidated returns filed for 1945 and 1946, in the amounts of \$322,814.46 and \$107,174.58, respectively. (R. 52-53.)

At the time of filing the consolidated return for the year 1943, a separate return was also filed by Palos Verdes for the period begun March 1, 1943, and ended December 2, 1943. The books of Palos Verdes were closed for this purpose on December 2, 1943. (R. 53.)

The Commissioner, by letter dated March 3, 1950, notified American Pipe of his determination that the losses incurred by Palos Verdes in 1943 and 1944 could not be offset against the income of American Pipe during the tax years 1944, 1945 and 1946, and that the two corporations could not file consolidated tax returns for those years. (R. 28-31.) The resulting deficiencies proposed against American Pipe were as follows (R. 50) :

Year	Tax	Deficiency
1944.....	Income	\$23,504.02
	Excess Profits	34,955.02
1945.....	Income	17,753.50
	Excess Profits	84,299.14
1946.....	Income	53,264.70

As of December 2, 1943, the principal assets of Palos Verdes consisted of approximately 695 lots in the vicinity of Palos Verdes, California. These lots had been sold and transferred by tax deeds to the State of California on or about July 1, 1938, for nonpayment of taxes for the year 1931-1932 totaling \$97,406.39. Palos Verdes had been in poor financial condition since 1936. (R. 53.) Its predecessors, seeking to promote the same project, also had experienced financial disaster since at least 1921. (R. 559-561, 586.) The period between 1938 and 1943 was the worst in its financial history. The lots owned by Palos Verdes were in a restricted residential area with a specified minimum cost for houses built therein. These restrictions were supervised by lot owners who composed The Palos Verdes Home Association and a committee known as the "Art Jury". Originally in 1920, the lots held by Palos Verdes embraced a larger tract. As early as 1937, Palos Verdes had unsuccessfully tried to interest buyers and contractors in combining with it in the erection of houses as an attraction for the sale of its remaining lots.

Much of the property was wholly or partly without improvements as to roads and utilities. It had, in 1942, three employees, two of whom were on a part-time basis. (R. 53-54.)

The stock control of American Pipe, during 1942 and all subsequent taxable years in issue in this proceeding, rested in Jack Lane and W. G. Krieger, who were partners or associates in the purchase of approximately 96 per cent of the outstanding shares thereof. Their interests in the shares were equal. At all times pertinent to the issues in these proceedings, Lane was the president of American Pipe and Krieger was secretary or secretary and treasurer. (R. 54.)

Aside from a brief period, Lane had been associated with American Pipe since about 1928. He was vice-president thereof from the time he acquired his 48 per cent stock interest until in or about 1942 when he became president. He had previously been credit manager for about 10 years. Although largely self-educated, he had experience in various departments of an oil company, including the production and auditing departments. Lane had an extensive background in many phases of the local real estate business, including the development of tracts, management and selling of properties through his own concern. He had long been familiar with real estate in the Palos Verdes area, having acquired a real estate broker's license in 1937, at which time he opened a real estate office four miles north of Palos Verdes. (R. 54-55.)

American Pipe was principally engaged in the steel fabricating business, its main products being pipe and different types of tanks, fabricated products of steel, aluminum and other alloys. Some of the larger items

were field fabricated. More than 500 different products were manufactured. (R. 55, 353-355; Ex. 35.)

In May of 1942, American Pipe began negotiations with the War Production Board in San Francisco concerning the building of 25,000 forge welded containers or tanks for lethal gas. Prior to these negotiations American Pipe had been engaged on its own, and through subcontractors, in other war contracts, manufacturing various types of material for the war effort. (R. 55, 356.)

The specifications for the lethal gas containers called for a particular process of manufacture unfamiliar to American Pipe. After several trips east to inspect the plants of other firms making similar containers, Lane and American Pipe's engineer arrived at an estimate which Lane submitted as a preliminary bid for the contract on June 26, 1942. (R. 55, 360-362.) The War Production Board turned the matter over to the Chemical Warfare Service in San Francisco for further negotiations. In July of 1942, Lane felt that the contract would be awarded to American Pipe. (R. 55, 359.) On September 3, 1942, American Pipe received a written contract from the Chemical Warfare Service to produce 25,000 containers for \$3,500,000. (R. 55-56, 365.) A new plant had to be constructed and it was March or April, 1943, before production of containers was commenced. (R. 364.)

Robert P. Archer had known Jack Lane since 1932. (R. 136.) Over the years Archer had been engaged in several facets of the real estate business (R. 119-126), and was a licensed real estate broker in the Los Angeles area for much of the period from 1926 through 1942 (R. 126-127). He met Ben Haggott, president of Palos

Verdes, in 1926 or 1927 and assisted him (Haggott was considerably younger than Archer) in learning real estate appraisal. They became good friends. (R. 127-129.) Haggott became president of Palos Verdes on February 2, 1938. (R. 129.) Archer was well aware of the distressed financial position of Palos Verdes. (R. 130.)

Lane and Archer first discussed Palos Verdes at their meeting on May 29, 1942, during the course of their discussion about Lane's efforts to obtain the chemical warfare contract. (R. 136-137, 343-344.) Archer testified that he had no assets, but had become interested in acquiring the stock of Palos Verdes. (R. 131.) He was of the opinion that the tax sale could be set aside. (R. 121-132.) Lane was aware of the fact that substantial tax liens would have to be paid to clear title on the lots. (R. 490.)

Lane was interested in Archer's acquaintance with Major English who was in charge of the Los Angeles branch office of the Chemical Warfare Service. (R. 137, 344.) Within a day or two Archer arranged a meeting of Lane and Major English to discuss American Pipe's chances of obtaining the chemical warfare contract. Major English told Lane that the contract was outside his jurisdiction. (R. 344-345.) No further contact was had with Major English about this contract. Archer knew no one else at the Chemical Warfare Service. (R. 173-174.)

The testimony is that Lane thereafter suggested that Archer work for American Pipe as an expeditor in connection with the chemical warfare contract (R. 345), and Archer agreed to take the job at \$100 a week provided that American Pipe would loan him \$2,500

to help him finance the purchase of the stock of Palos Verdes. Archer was to have the necessary free time that he would need to acquire the stock of Palos Verdes. (R. 136-139, 345-346.) Archer was employed by American Pipe on August 12, 1942, on which date he was placed on the payroll as an accountant. He had never engaged in accounting work. (R. 56-57.)

On August 18, 1942, an escrow account was opened with the Bank of America in the name of "R. P. Archer" with \$1,000 advanced by American Pipe. Archer knew that the going market price for shares of Palos Verdes stock was 25 to 50 cents a share. Nevertheless, he determined to offer the stockholders \$2 a share. (R. 57, 145-146.) An offer was drawn on August 18, 1942, and sent to the stockholders with a letter from Haggott explaining the extremely poor present and prospective position of Palos Verdes and suggesting that Archer's offer presented a means of their salvaging something. (R. 150-154.) The offer of \$2 a share was binding only if Archer could purchase 70 per cent of the stock. (R. 154-155.) His stated purpose in wanting 70 per cent of the stock was to be able to pass a resolution imposing an assessment of about \$40 a share on those stockholders who would not sell, and thereby freeze them out. In this manner 100 per cent of the stock would be acquired. (R. 58, 229-230, 236-237.) Archer knew that 51 per cent of the stock was a controlling interest, and had no explanation of why he insisted on 100 per cent. (R. 237-238.)

The offer of \$2 a share which was circulated among the stockholders of Palos Verdes was signed "R. P. Archer, Nominee". (Ex. 4.) Archer knew that the word nominee appeared on the offer, and he knew that a person cannot be his own nominee. He could not ex-

plain how the expression happened to be used on the offer and insisted that he was no one's nominee, but purchased the stock for himself. (R. 214-215.) He admitted that at the time he offered to buy the stock he knew that back taxes amounted to between \$80,000 and \$100,000, and that he did not have the financial ability to pay them off. (R. 217-218.) He was personally without funds, had alimony commitments, and was virtually "broke". (R. 57.)

Archer stated that the \$2 figure was offered instead of the market price of 50 cents because a round figure like \$2 is more attractive than a figure representing a fraction of a dollar, and because it was higher than the market price (400 per cent higher) and "one that I could afford to pay". (R. 145-146.) Lane knew that Archer was paying \$2 a share. (R. 487.) American Pipe advanced the funds. (R. 487-488.)

As a result of the offer and the accompanying letter of Mr. Haggott (Ex. 3, R. 150-154), slightly more than 2,500 shares of Palos Verdes stock came into the escrow account over a six- to ten-month period. (R. 156.) The acquisition of the 2,500 shares was financed entirely by American Pipe, which advanced between \$6,000 and \$7,000. (R. 57, 157.)

Having lost title to all its remaining real estate assets by reason of nonpayment of Los Angeles county taxes for the year 1931-1932, and tax deeds therefor having been given by the tax collector to the State of California on July 1, 1938, Palos Verdes, on July 27, 1943, instituted an action in the Superior Court of the State of California against the State of California and other taxing authorities to set aside the tax sales and tax deeds with respect to 695 lots. On August 2, 1943, the Court entered an interlocutory decree based

upon a stipulation of the parties concerned, and set aside the tax sales and tax deeds to the lots involved in such action. The decree restored the rights of redemption free of interest, penalties and costs, but limited the extension of time so to redeem by requiring payment of all such delinquent taxes, as corrected, to be made within six months after the decree became final. (R. 58-59.) Mr. Roy Dolly, the lawyer for American Pipe, prepared the stipulated interlocutory decree for Palos Verdes. (R. 61, 492.)

More than a month before the commencement of the tax title redemption action, a sufficient percentage of shares had been acquired to enable the amendment of the Articles of Incorporation of Palos Verdes so as to permit the levying of assessments upon the stock of Palos Verdes; and, at a special meeting on June 23, 1943, the board of directors of Palos Verdes adopted a resolution to this end. On August 26, 1943, an assessment of \$40 a share was levied and the resolution, which so levied the assessment, provided for a certain day, September 27, 1943, for payment of such assessment, and further provided and fixed the time at which delinquent stock would be placed on sale or forfeited if **unsold**. The date originally selected for sale or forfeiture of Palos Verdes stock, October 15, 1943, was postponed until December 2, 1943. (R. 59.)

None of the holders of record of Palos Verdes offered to pay the assessment of \$40 plus five per cent delinquency penalty on each share of stock held by them. The only person to appear and bid upon any portion of stock offered at the assessment sale was Archer who bid upon and purchased 96 shares of stock, held by seven individuals, for a total of \$4,032. In bidding upon the 96 shares, Archer was acting for Ameri-

can Pipe and the funds used by Archer to purchase such shares were furnished to him for that purpose by American Pipe. Title to the 96 shares bid in by Archer was taken by Archer in his own name. The shares purchased through escrow and at the assessment sale constituted all of the outstanding stock of Palos Verdes. In confirming Archer's purchase of the 96 shares of stock, the directors, on December 2, 1943, the same day as the sale, declared all other shares forfeited for failure of any person to pay the assessment plus penalty thereon. (R. 59-60.)

Archer relinquished his control over the 2,500 shares to American Pipe late in 1943, in return for cancellation of his indebtedness. (R. 162-163.) As a result of the purchase of 96 shares by Archer in behalf of American Pipe, on December 2, 1943, American Pipe became the owner of all the outstanding shares of stock of Palos Verdes. Such stock was obtained by American Pipe at a total cost of \$11,248.96, which figure includes the \$4,032 paid for the 96 shares purchased by Archer at the assessment sale, as well as the funds furnished to Archer for the purchase of approximately 2,600 shares through the escrow procedure. (R. 60.)

Beginning with December 3, 1943, and continuing through the periods involved in these proceedings, Palos Verdes was a wholly-owned subsidiary of American Pipe. Prior to its acquisition by American Pipe, the fiscal year of Palos Verdes ended on the 28th day of February, whereas American Pipe filed its returns on the calendar year basis. Both taxpayers used the accrual basis of accounting. American Pipe caused Palos Verdes' fiscal year to be changed to the calendar year effective from December 2, 1943, and American Pipe further caused consolidated returns to be filed

for the short 1943 period, as well as for the subsequent years here involved. (R. 60-61.)

When Archer went on American Pipe's payroll he owned his own firm, Archer Machine Products, which was just starting operations. (R. 139-140.) During part of the time that he was employed by American Pipe he worked for Midland Ordnance, a firm in Illinois. (R. 139.) His time was broken up, he testified, among his various interests of acquiring Palos Verdes stock, taking care of his own Archer Machine Products, working for Midland Ordnance, and doing "a little expediting for American Pipe and Steel Company". (R. 146.) It is not clear for just how long after December 2, 1943, Archer continued on the American Pipe payroll. At the very longest it was a period of but several months. (R. 139.) During the tax years involved and to the date of this proceeding Archer owned an interest in a project in Glendale. The other owners are Jack Lane, Carl Dahlberg, and Roy Dolley. (R. 61, 298.)

Jack Lane testified that he became interested personally in Palos Verdes, but could not raise the funds to liquidate the tax liens; that he later developed a plan whereby Palos Verdes could be used by American Pipe; that in pursuance of this plan he suggested in a letter to the board of directors dated November 25, 1943, the uses to which it could be put. (R. 376-381.) The letter is set out verbatim in the Tax Court's findings (R. 67-72) and states that certain advantages would accrue to American Pipe by acquiring Palos Verdes. Lane admitted on cross-examination that the stated advantages would largely have been available to American Pipe by forming a new corporation. (R.

501-503.) On the same date, November 25, the board of directors of American Pipe adopted a resolution authorizing Lane to purchase the stock of Palos Verdes. (R. 73.)

Almost immediately after December 2, 1943, and beginning on December 23, 1943, Lane caused several advertisements to be run in the Los Angeles newspapers announcing the "liquidation sale" of Palos Verdes Estates. (Exs. 9 and 10; R. 61, 285-286.) Mr. Carl B. Dahlberg, who had known Lane for more than ten years, and who is now vice-president of American Pipe, was the only interested purchaser. (R. 61, 275-276.) He was permitted to purchase 451 lots for \$16,000, at \$40 per lot, plus assumption of the taxes of \$10,000. He paid no cash, giving instead his personal four-year five percent note dated December 28, 1943, in the amount of \$18,000. When the taxes became due in a few months, Palos Verdes advanced the funds taking in exchange Dahlberg's four-year five per cent note for \$9,884.83. A deed was given him December 30, 1943. His wife executed in his favor a quit claim deed. (R. 62-63, 289-291.) At no time did Dahlberg make any cash payments on the principal of the notes or the interest. (R. 63, 302.) He knew at the time he supposedly purchased the lots that war-time restrictions prohibited any possible building. (R. 302-303.) Roy Dolley, American Pipe's attorney, was Dahlberg's attorney in the matter of his purchase of Palos Verdes lots. (R. 300.)

Some four years later, on January 28, 1948, Dahlberg reconveyed by grant deed to Lane personally the lots he held which had not been lost for taxes. The terms of the reconveyance were that if and when Lane sold

the lots, the first \$37,000 was to be used to extinguish Dahlberg's liability for the principal and interest on the two notes he issued. Any amount realized over \$37,000 was to belong to Lane. Dahlberg retained no interest in the property. (R. 63; Ex. 16, R. 316-318.)

The basis to Palos Verdes of the lots purportedly sold to Dahlberg in 1943 was \$250,781, and the resulting paper loss on the books of Palos Verdes was \$232,781. This loss was reflected on the consolidated returns filed for the period from December 3, 1943, to December 31, 1943, by American Pipe and Palos Verdes as an operating loss of Palos Verdes. (R. 64.)

On January 15 and 16, 1944, American Pipe caused the balance of the lots remaining after the Dahlberg sale to be put up for public auction. The public auction was under the direction of Dean S. Bedilion, a well-known local real estate auctioneer. The advertisements for this auction which appeared in local newspapers stressed the fact that the lots to be sold represented "The Last of the Better Residential Districts in Southern California". The lots which were sold at auction netted \$16,185 after costs of sale. The basis to Palos Verdes of the lots sold was \$183,797.91. The resulting loss of \$167,612.91 was reflected on the consolidated returns filed for 1944. Some additional lots were sold at private sales, after the date of the auction, some of them for around \$500 each. The remainder of the lots not redeemed or sold by Palos Verdes was lost under the terms of the Final Decree of the Superior Court entering judgment to quiet title in the State of California. This Decree was entered on May 15, 1944. Final judgment in favor of Palos Verdes on all lots redeemed by payment of delinquent taxes was entered

on March 16, 1945. This judgment in favor of Palos Verdes, on all lots redeemed, operated for the benefit of its grantees, inasmuch as it no longer owned any lots in Palos Verdes tracts. (R. 64-65.)

Subsequently, in 1947, the State of California put up for sale some of the lots unredeemed and lost by Palos Verdes. At this sale, Lane personally bought for his own account as many lots as he could afford to purchase at that time and now owns altogether approximately 300 lots. (R. 65.) When asked why American Pipe did not reacquire these lots, rather than himself personally, Lane answered that his associates felt that "the real estate business was not germane to the steel business and they had no business having a subsidiary in the real estate business". (R. 457.)

When asked, in view of American Pipe's stated purpose to utilize the lots, why it immediately sold at sacrifice prices or otherwise lost all of the lots, Lane suggested two answers. First, the sale to Dahlberg was in the expectation that he would immediately start building houses, thereby appreciating the value of the lots retained by Palos Verdes. (R. 503-504.) It was common knowledge, however, that war-time housing restrictions barred any such plan, and Lane knew this. (R. 496-498.) The housing restrictions were never lifted; they expired sometime after the war. (R. 513.) Lane's main explanation was that as of December 2, 1943, the date he claims that American Pipe acquired ownership of Palos Verdes, he did not know that under the terms of the interlocutory decree the taxes had to be paid within six months. (R. 405-406.) He stated that Mr. Dolley, who prepared the stipulated interlocutory decree, and who was also American Pipe's lawyer,

did not advise him of the terms of the decree. (R. 492.) He admitted that he was familiar with Exhibit 24 which showed the total taxes due and which referred to the interlocutory decree. (R. 493.)

Lane denied that American Pipe's accountants secured working papers of Palos Verdes in August of 1942 to examine its financial position. (R. 485-486.) Mr. Wilford G. Edling, a certified public accountant and auditor for American Pipe during 1942, identified Exhibit T as a receipt signed by himself on August 15, 1942, witnessing that he took from Roy W. Burton a folder file of Palos Verdes of February 28, 1942, and Union Bank Trustee return of foreclosure sale. Edling stated that the only person who might have directed him to obtain these items would have been Mr. Lane of American Pipe. (R. 572-573.)

American Pipe experienced serious trouble in its attempted performance of the chemical warfare contract, especially concerning interpretation of the specifications. (R. 364, 366-368.) American Pipe had not maintained the schedule called for under the contract, partly through its own fault and partly through conditions over which it had no control. (R. 372.) Lane was notified that a more lethal gas had been discovered which could not be packaged in the containers being manufactured by American Pipe, and that the contract was, therefore, to be terminated. (R. 369.) He was informed by the San Francisco office that there was no chance it would be cancelled for cause; it was to be cancelled for the convenience of the Government. (R. 373.) The contract was terminated by written notice dated September 29, 1943. It stated that the cancellation was

for the necessity and convenience of the Government, and American Pipe would be compensated for the uncompleted portion of the contract. (Ex. 27; R. 420-422.) In October, 1943, American Pipe filed a claim in the amount of \$1,252,000, which included the amount for the erection of its new plant at Alhambra to manufacture the containers. (R. 67.) A final settlement allowing American Pipe \$1,050,000 was reached in the last few days of December, 1943, or early in January, 1944. (R. 67, 374-375.) American Pipe reported an operating loss on the contract of \$116,240.30, reducing its separate net profit in 1943 to \$16,880.52. (R. 67.)

American Pipe produced Exhibit 31, which was a schedule of contracts awarded in 1943, and which indicated a backlog as of December 31, 1943, of prime Federal Government contracts amounting to \$850. This purportedly represented the backlog on such contracts awarded in 1943 in the amount of \$224,648. It did not include the chemical warfare contract which had been terminated in September, 1943. The total did not include the backlog of subcontracts for war materials not completed as of December 31, 1943, amounting to \$123,753. (Ex. 31; R. 74-75, 429-431.) Lane had stated in the Cancellation Claim submitted to the Government on October 14, 1943, that immediate reimbursement on the cancelled contract was necessary because American Pipe was left without operating funds, and "We have a substantial backlog of war work". (Ex. 28; R. 67.)

As of December 31, 1944, American Pipe had a backlog of prime Federal Government contracts amounting to \$1,006,275, on total contracts awarded during the year of \$1,892,144. (Ex. 44; R. 75.) This total did not include subcontracts for war materials, of which the

amount not completed as of December 31, 1944, was \$14,213. (R. 75.)

American Pipe had allocated all its labor plus any other it could obtain to its production under the chemical warfare contract. More war work could have been performed except for the labor shortage. (R. 527-528.)

The Tax Court affirmed the Commissioner's determination. (R. 79.)

SUMMARY OF ARGUMENT

A. The application of Section 129 serves to deny the taxpayer the right to offset Palos Verdes' losses against American Pipe's profits on consolidated tax returns. This section denies deduction, credit, or allowance where the taxpayer has acquired on or after October 8, 1940, at least 50 per cent control of a corporation, the "principal purpose" of which was tax avoidance by securing the deduction, credit, or allowance, which would not otherwise have been available. For Section 129 to be applicable the tax purpose need not constitute the sole purpose, nor must it exceed in importance the sum of all other purposes. It is sufficient if the tax avoidance purpose was more prominent than any other one purpose. The question of purpose, that is, the intent with which the acquisition was made is one of fact for the trial judge, the resolution of which will not be disturbed on appeal if supported by substantial evidence.

The sole dispute regarding the application of Section 129 in this case concerns whether the "principal purpose" of the acquisition was to avoid taxation. The evidence clearly *shows* that it was. The significant factors are as follows:

At the same time that the stock of Palos Verdes was acquired by American Pipe, the latter's prospective in-

come situation was very bright. It had large war contracts, and the prospects of obtaining further contracts were excellent, as is borne out by examining its earnings for 1944, 1945 and 1946. On the other hand Palos Verdes had consistently been a business failure, and its future prospects at the time it was acquired by American Pipe were bleak. The situation was tailor-made for the type of tax avoidance scheme at which Section 129 is aimed. The comparative earnings situation of the two corporations takes on added emphasis by the failure of the taxpayer to show any legitimate business purpose for the acquisition.

The figure of \$2 which was paid by American Pipe for each share of stock was four times the normal market price. This premium undoubtedly represented the cost of the tax losses purchased.

The loss was realized immediately after the total acquisition of Palos Verdes' stock. This emphasizes the fact that American Pipe had no business purpose for the acquisition, but purchased the stock solely to get its hands on the losses.

The record shows not only that taxpayer's principal purpose was tax avoidance, but that it was its sole purpose.

The Tax Court's decision was based on an examination of the entire record. It did not base its decision on the presumption of correctness of the Commissioner's determination.

B. The taxpayer was not entitled to file consolidated returns regardless of the purpose behind its acquisition of the stock of Palos Verdes. Section 129, which requires for its applicability that the principal purpose

of acquisition be tax avoidance, is not the exclusive section to which the Government may resort.

American Pipe acquired all the stock of Palos Verdes for \$11,248. On the sale of the lots Palos Verdes suffered a book loss of \$400,394. The real economic loss was suffered by the old stockholders of Palos Verdes, who sold out to American Pipe for a price far below the original invested capital contributions. Section 141, which allows the filing of consolidated returns, cannot be so taken advantage of as to permit American Pipe, regardless of its reasons, to blatantly purchase \$400,394 worth of someone else's losses for a pittance, and offset such fabricated losses against its own income.

The privilege of filing a consolidated return, with accompanying advantage of inter-company offsets, is a departure from the underlying rule confining allowable losses to the taxpayer sustaining them. It reflects a recognition that where an affiliated group as a whole does not show a profit, it would be unfair, for example, to tax the profitable parent corporation without permitting the losses of the unprofitable subsidiary to be offset. But it is basic to this reasoning that where the losses of the subsidiary are in no way experienced in an economic sense by the parent, offset against the parent's profits should not be allowed. The congressional purpose was to limit the privilege of filing a consolidated return to the situation where not only did the subsidiary incur a tax loss, but the parent corporation sustained an economic loss as a result. Where, as in the instant case, neither the parent corporation nor its stockholders have suffered any economic loss from the operations of the subsidiary, all reason for allowing a consolidated return vanishes. To rule otherwise would be to stretch

the application of Section 141 to a situation outside the scope of the congressional purpose.

ARGUMENT

The Losses of Palos Verdes Cannot, by Means of Consolidated Tax Returns, Be Offset by American Pipe Against Its Gains

A. American Pipe was not entitled to file consolidated tax returns because of Section 129

1. Section 129 in general

This case involves an illustration of the constant search by taxpayers for loopholes in the tax statute. By 1940 various schemes designed to avoid taxation by intercorporate transactions were not uncommon. At first Treasury officials felt that the trend of court decisions (notably *Woolford Realty Co. v. Rose*, ^{286 U.S. 319} *supra*; *Gregory v. Helvering*, 293 U.S. 465; *Higgins v. Smith*, 308 U.S. 473) made it unnecessary to seek additional legislation. But by the middle of 1943 these schemes became quite numerous and widespread. The Treasury, to play safe, sought legislative help. Section 129 of the Internal Revenue Code of 1939 (Appendix, *infra*) was added to strengthen its position in knocking down acquisitions designed principally to achieve a tax benefit not otherwise available. See Rudick, *Acquisitions to Avoid Tax*, 58 Harv. L. Rev. 196, 199 (1944).

The pertinent language of Section 129 is as follows:

If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, * * * and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other

allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. * * * control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

Taxpayer concedes that it was not entitled to the consolidated tax returns if Section 129 is applicable. (Br. 31.) In return, the applicability of the section depends upon the satisfaction of three prerequisites: (1) The taxpayer must have acquired on or after October 8, 1940, at least 50 per cent control of a corporation; (2) the "principal purpose" behind the acquisition must have been tax evasion or avoidance; (3) by securing a deduction, credit, or allowance which would not otherwise have been available. *file*

It is not disputed that American Pipe acquired control of Palos Verdes after October 8, 1940, and that the claimed deduction or allowance for Palos Verdes' losses was available solely as a result of this acquisition. The sole dispute regarding the application of Section 129 concerns whether the principal purpose of the acquisition was to evade or avoid Federal income or excess profits taxes.

The legislative purpose behind Section 129 is clear. As stated in 7A Mertens, Law of Federal Income Taxation, 1954 Cum. Pocket Suppl., Sec. 42.145(a), p. 299:

Congress, in connection with the Revenue Act of 1943, recognized and sought to put a stop to the growing tax avoidance device of buying up corporations having losses, excess profits credits, or a large

invested capital base, in order to improve the tax situation of the purchaser.

The legislative history of the bill is carefully traced in *Commodores Point Terminal Corp. v. Commissioner*, 11 T. C. 411. See also Rudick, *Acquisitions to Avoid Tax*, 58 Harv. L. Rev. 196, 200-206 (1944). Concerning the meaning of "principal purpose" the Senate Finance Committee Report states that "the section should be operative only if the evasion or avoidance purpose outranks or exceeds in importance, any other one purpose". S. Rep. No. 627, 78th Cong., 1st Sess., p. 59 (1944 Cum. Bull. 973, 1017). Likewise the Treasury Regulations (Regulations 111, Sec. 29.129-3) specify that—

If the purpose to evade or avoid Federal income or excess profits tax exceeds in importance any other purpose, it is the principal purpose. This does not mean that only those acquisitions fall within the provisions of Section 129 which would not have been made if the evasion or avoidance purpose was not present.

It is thus clear that the tax purpose need not constitute the sole purpose, nor must it exceed in importance the sum of all other purposes. It is sufficient to invoke Section 129 that the tax avoidance purpose was more significant than any other one purpose.

The question of purpose, that is, the intent with which the acquisition was made, is one of fact for the trial judge (*Alcorn Wholesale Co. v. Commissioner*, 16 T. C. 75, 89), the resolution of which will not be disturbed on appeal if supported by substantial evidence, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses. See Federal Rules

of Civil Procedure, Rule 52; *United States v. Yellow Cab Co.*, 338 U. S. 338; *United States v. Real Estate Boards*, 339 U.S. 485; *Wisdom v. United States*, 205 F. 2d 30 (C.A. 9th).

The decisions under Section 129 are few. If any one conclusion can be drawn, it is that the issue being factual, the resolution of each case must turn on its peculiar facts. *Alcorn Wholesale Co. v. Commissioner*, 16 T. C. 75, involved the common situation of a corporation deciding to incorporate each of its branch operations. It was shown that by so doing the position of the business was strengthened by having increased borrowing power, more limited liability, the elimination of prejudice against absentee ownership, and greater facility in handling competitive lines. The split-up was initiated for these business reasons. Inasmuch as the split-up was not principally for tax purposes, Section 129 was not applicable, and each corporation was entitled to the specific excess profits tax exemption of \$10,000 under Section 710 (b) of the Code. This split-up situation was also involved in *Berland's Inc. of South Bend v. Commissioner*, 16 T.C. 182, and *Chelsea Products, Inc. v. Commissioner*, 16 T.C. 840, affirmed, 197 F. 2d 620 (C.A. 3d). Each case was decided for the taxpayer on essentially the same showing of business purpose.

The tax advantage sought in *Commodores Point Terminal Corp. v. Commissioner*, 11 T.C. 411, was not dependent upon control of the acquired corporation. The dividends received credit (see Section 26(b) of the Code) would have been available even had the taxpayer acquired less than 50 per cent of the acquired corporation. Furthermore the taxpayer's primary purpose was to obtain working funds, a business reason. And it was

not a case of a corporation with large earnings acquiring a corporation with past, current, or prospective losses, or unused excess profits credits.

The principal purpose of the merger in *W A G E, Inc. v. Commissioner*, 19 T.C. 249, was to furnish working capital to the needs of the acquired corporation. This was held to be a business purpose.

Strictly speaking, Section 129 was not applicable in *Alprosa Watch Corp. v. Commissioner*, 11 T.C. 240, because the tax year was for a period before the effective date of its operation. In any event, the facts show that the Eisner Company had to acquire an existing corporation in order to market the watches. This was the principal reason for acquiring the Esspi Corporation, and it was held to be a business reason.

In *Alpha Tank & Sheet Metal Mfg. Co. v. United States*, 116 F. Supp. 721 (C. Cls), the taxpayer deeded its property to the Delmo Company, which was organized and owned by taxpayer's stockholders, and took a lease back. The court upheld the disallowance of the monthly rental under Sections 45 and 129 because there was no legitimate business purpose for Delmo's existence.

While none of the above cases involved the use of consolidated returns, the legislative history of Section 129 shows explicitly that one of its purposes was to protect the basic policies of the consolidated returns provisions. S. Rep. No. 627, 78th Cong., 1st Sess., p. 60 (1944 Cum. Bull. 973, 1017); H. Conference Rep. No. 1079, 78th Cong., 2d Sess., p. 55 (1944 Cum. Bull. 1059, 1070).

As we stated above, the only conclusion to be drawn from the decided case is that since the question of "principal purpose" is one of fact, each case must be decided on its own facts.

2. American Pipe's principal purpose of acquiring control of Palos Verdes was to avoid federal income and excess profits taxes

There are several factors in this case, all of which point rather emphatically to the conclusion that the principal purpose of acquisition was tax avoidance.

(a) American Pipe's earnings compared with Palos Verdes' losses

During the tax years involved American Pipe had substantial earnings from war contracts. (R. 52.) On the other hand Palos Verdes had huge losses due to the decline in value of its assets, awaiting only the tax event of a sale to be realized. If Palos Verdes could be acquired for a nominal amount and its huge paper losses offset against American Pipe's war profits, taxation might be avoided in large measure. The situation was tailor-made for the type of tax avoidance scheme, the consummation of which Section 129 is aimed at.

Early in 1942 American Pipe's prospective earnings picture was very encouraging. It was in the heavy metal fabricating industry, and was capable of producing over 500 different products. The country was at war. A mere glance at Exhibit 35 will convince the Court that American Pipe was able to produce a variety of items necessary to the war effort. This Court may take judicial notice that American Pipe was certain to obtain war contracts. As a matter of fact by July of 1942 Lane felt confident that the chemical warfare contract, amounting to \$3,500,000, would be awarded it, and on September 3, 1942, it was awarded. (R. 55-56, 359, 365.) During the negotiations, American Pipe had

been engaged on its own, and through subcontractors, in other war contracts, manufacturing various types of material for the war effort. (R. 55, 356.) With the addition of the chemical warfare contract, it was producing at maximum capacity under the existing labor conditions. (R. 527-528.)

Taxpayer asserts, however, that it was not until December 2, 1943, some two months after the chemical warfare contract was cancelled, on September 29, 1943, that it acquired the stock of Palos Verdes, and that at such time its prospective profits were uncertain. We submit that the plans to acquire Palos Verdes for American Pipe were begun in May, 1942, just after the negotiations for the chemical warfare contract started, and that Archer was an agent for American Pipe so that all his activities were in reality attributable to American Pipe. The following facts substantiate our position.

Lane and Archer first discussed Palos Verdes at their meeting on May 29, 1942, during the course of their discussion about Lane's efforts to obtain the chemical warfare contract. (R. 136-137, 343-344.) By July of 1942, Lane was confident the contract would be awarded to American Pipe. (R. 55, 359.) Very soon thereafter, on August 12, 1942, Archer was taken on the payroll. (R. 56-57.) Ostensibly Archer was hired to expedite the contract, but the contract was already certain to be awarded. Archer knew Major English of the Los Angeles office of the Chemical Warfare Service, but Major English told Lane in June of 1942 that the contract was outside his jurisdiction. No further contact was had with Major English. Archer knew no one else at the Chemical Warfare Service. (R. 173-174.) Yet

Archer was supposedly hired as an expediter after his sole contact of influence was seen to be useless. The record does not abound with descriptions of Archer's work as an expediter. To the contrary, he indicated that he spent little time and effort for American Pipe, unless it be considered, as we submit, that his efforts in acquiring the stock of Palos Verdes were on behalf of American Pipe. During the time he was on American Pipe's payroll he devoted attention to his own firm, Archer Machine Products, he worked for an Illinois corporation, he was busy acquiring stock of Palos Verdes, and he did "a little expediting for American Pipe and Steel Company". (R. 146.) For his expediting work he was paid \$100 a week plus American Pipe's commitment to loan him \$2,500 to help finance the purchase of Palos Verdes stock. (R. 136-139, 345-346.) He was placed on the payroll as an accountant, but had never engaged in accounting work. (R. 56-57.) His label as an expediter was a sham. For what, then, was he paid \$100 a week? The answer is to acquire for American Pipe the stock of Palos Verdes. Archer was a good friend of Ben Haggott, the president of Palos Verdes, had known him since 1926 (R. 127-129), and was also well aware of the distressed financial position of Palos Verdes. (R. 130.) Haggott was of great help in persuading the stockholders to sell. He personally wrote a letter, which was distributed to all stockholders, stating the very poor future prospects of Palos Verdes, and that Archer's offer provided an opportunity to salvage something. (Ex. 3, R. 150-154.) In hiring Archer to purchase the stock, American Pipe was getting the services of someone who not only knew the inside working of Palos Verdes, but who could rely

on Palos Verdes' president to bring the deal off successfully.

It is not unreasonable to conclude that Lane also knew Palos Verdes' financial condition, if as he claims, American Pipe was to back the purchase of the stock, taking the stock as security. (R. 57.) Furthermore, Mr. Edling, the accountant and auditor for American Pipe, testified to the effect that he had obtained on August 15, 1942, for Mr. Lane, papers of Palos Verdes as of the end of its fiscal year 1942, at Lane's direction. (R. 573.)

Archer knew that there were large tax liens against the lots. He knew that Palos Verdes had never been successful. (R. 53, 130, 559-561.) He was also aware of the wartime building restrictions, and the restrictions imposed by the Palos Verdes Homes Association, which combined were certain to keep the value of the lots depressed until after the war. Furthermore, he was personally without funds, had alimony commitments, and was virtually "broke". (R. 57.) The interlocutory tax redemption decree allowed only six months to pay off the tax liens. (R. 61, 492.) Under these circumstances Archer's story that he was buying the stock for himself as an investment is just not plausible.

The offer which was supposedly made by Archer to the stockholders of Palos Verdes was signed "R. P. Archer, Nominee". (Ex. 4.) He knew that he could not be his own nominee, but he had no explanation of why the term was used. (R. 214-215.) We submit that he made the offer as the agent of American Pipe, and most likely inserted the word nominee in order to limit his liability in the event of a default.

The money to purchase the 2,500 odd shares was advanced entirely by American Pipe, and amounted to between \$6,000 and \$7,000. (R. 157.) At the opportune moment, just before American Pipe decided to realize the loss on the December, 1943, sale, Archer turned over all the stock in exchange for being relieved of his indebtedness to American Pipe. It seems that Archer suddenly realized that he could not raise the money to pay the taxes. It is interesting to note also that American Pipe did not have the available funds to liquidate the tax liens. (R. 506, 509.)

The offer of \$2 a share was binding only if Archer could purchase 70 per cent of the stock. (R. 154-155.) His stated purpose was to have enough stock to pass a resolution imposing a prohibitive assessment on those stockholders who would not sell, and thereby freeze them out. In this manner the purchaser would be assured of having 100 per cent control. (R. 58, 229-230, 236-237.) The question arises as to why it was so important for Archer to have all the stock, so necessary in fact that the offer was conditioned on his acquiring 70 per cent. If a good profit could be made, as Archer stated he thought it could, why would he not settle for whatever percentage over 50 he could acquire? The answer is that it was American Pipe that was making the offer, and the tax scheme of offsetting Palos Verdes' losses on a consolidated tax return could be accomplished under the statute only if 95 or more per cent of the stock could be acquired. See Section 141(d).

The stipulated interlocutory decree of August 2, 1943, under which Palos Verdes could redeem the lots, was prepared by Mr. Roy Dolley, the lawyer for American Pipe. (R. 61, 492.) It should be noted that a suffi-

cient percentage of shares to levy the assessment had been acquired before commencement of the tax title redemption action. American Pipe was careful not to finally commit itself until it was certain of acquiring the requisite 95 per cent of the stock necessary to file a consolidated return.

In partial explanation of Archer's story that he was dealing for himself, it should be observed that he was not a completely disinterested witness. Aside from his long-standing friendship with Lane, he owns an interest in a project in Glendale, along with Lane, Dolley, and Dahlberg. (R. 61, 298.)

The inescapable conclusion from the above facts is that, in the purchase of Palos Verdes, Archer represented American Pipe from the moment he went on the payroll.

Taxpayer argues that the chemical warfare contract was cancelled before December 2, 1943, the date of the forfeiture sale, that it suffered a large loss on the cancellation of the contract, and thus had no tax reason for wanting to acquire Palos Verdes. There are several answers to this contention.

The assessment was levied on August 26, 1943, and it was at that time that the date for the sale or forfeiture of the remaining stock was set. (R. 59.) This was a month before Lane knew that the contract would be cancelled. (R. 369, 373, 420-422.)

More important, as of December 2, 1943, when American Pipe bid in 96 shares and caused the remaining 800 to 900 shares to be forfeited, no loss on the chemical warfare contract could have been anticipated. The contract was cancelled, not for cause, but because a more lethal gas had been developed which could not be packaged in the containers being manufactured under

the contract. (R. 369.) Lane was notified that there was no chance that the contract would be cancelled for cause, that it was to be cancelled for the convenience of the Government. (R. 373.) The written notice of termination, dated September 29, 1943, stated that the cancellation was for the necessity and convenience of the Government, and that American Pipe would be compensated for the uncompleted portion of the contract. (Ex. 27; R. 420-422.) The final settlement, on which basis American Pipe claimed an operating loss of \$116,240 on the 1943 tax return, was not reached until the last days of December, or early in January. As of December 2, 1943, there was no reason to anticipate a loss because, according to the cancellation notice, American Pipe was to be compensated for the uncompleted portion.

Furthermore, with the defense industry booming there was every reason to believe that other contracts would quickly fill the place of the chemical warfare contract. Judging from American Pipe's productive capabilities (Ex. 35), and from this country's desperate need for war materiel, the Tax Court could well infer that additional defense contracts would quickly fill the temporary gap, as indeed they did. It needs but a glance at American Pipe's earnings to bear this out. In 1944 American Pipe was awarded prime Federal Government contracts amounting to \$1,892,144, which when added to its subcontracts for war materiel, gave it a net profit of \$96,515. (R. 52, 75.) Its net profits for 1945 jumped to \$144,909, from which figure it more than doubled in 1946, to \$316,644. (R. 52.) In view of the known war-time conditions which were certain to provide American Pipe with the huge profits it

earned, it seems capricious, indeed, for taxpayer to argue that it did not anticipate its future income position.

Therefore, even though American Pipe did not come into full ownership of Palos Verdes until after the cancellation of the contract, as of December 2, 1943, when the last shares were acquired, American Pipe's financial outlook was bright. It is not difficult to perceive that taxes were a major concern. As an incidental matter, it would seem to make very little difference whether or not Archer acted for American Pipe in acquiring the first 2,500 shares. Its income prospects were not dimmed by the cancellation of the contract. Even if American Pipe did not decide until the fall of 1943 to acquire Palos Verdes, this is perfectly consistent with our position that the acquisition was actuated in the main, if not solely, by tax avoidance considerations and, indeed, was used to avoid taxes.

(b) *The offer of \$2 a share was 400 per cent higher than the going market price*

Both Archer and Lane knew that the going market price for Palos Verdes stock was 25 to 50 cents a share. (R. 152, 487.) Nevertheless the stockholders were offered \$2 a share. Archer's explanation for the high premium was that a round figure like \$2 is more attractive than a fraction of a dollar, and was a price that "I could afford to pay". (R. 145-146.) This is no explanation at all.

A much more logical explanation is that the stockholders of Palos Verdes were aware of the fact that American Pipe would be willing to pay a premium for the tax losses it was purchasing.

It has been common practice in the purchase of loss corporations to pay a price substantially in excess of true value. See Rudick, *Acquisitions to Avoid Tax*, 58 Harv. L. Rev. 196, 197 (1944). We submit that is what happened here.

(c) *The loss was realized immediately after final acquisition*

A very significant fact is that American Pipe caused Palos Verdes to immediately realize the built-in loss. Within a few weeks after the final acquisition and the forfeiture of the remaining outstanding shares, more than half the lots were purportedly sold to Carl Dahlberg.¹ This caused Palos Verdes to incur a loss of \$232,781 which was offset against and wiped out American Pipe's profit for the year. The excess was carried forward to offset and wipe out American Pipe's profit for 1944. (R. 52-53, 64.)

American Pipe then caused the remaining lots to be put up for public auction on January 15 and 16, 1944. On the lots sold at the auction Palos Verdes realized a loss, on the basis of the book value, of \$167,612. This was reflected on the consolidated return filed for 1944, and the excess was carried forward to offset in whole or in part American Pipe's profits for 1945 and 1946. (R.

¹ We say purportedly because even this transaction seems to have been a sham. Dahlberg, who had known Lane for ten years and who is now vice-president of American Pipe (R. 61, 275-276), was permitted to purchase 451 lots, for which he gave his note for \$18,000. Roy Dolley, American Pipe's attorney, acted as Dahlberg's attorney in this matter. Palos Verdes advanced him the money to pay the taxes, for which he again gave his note. A deed was given him on December 30, 1943. (R. 62-63, 289-291.) He never paid any part of the principal or interest on the notes, and later reconveyed to Lane in exchange for the extinction of his debt. (R. 63; Ex. 16, R. 316-318.)

52-53, 64-65.) The remainder of the lots not sold was lost under the terms of the Final Decree of the Superior Court entering judgment on May 15, 1944, to quiet title in the State of California. (R. 64-65.)

Taxpayer's contention, of course, is that it acquired Palos Verdes for business purposes. But it is difficult to reconcile ^{Lane's} their position with their actions. Within a very short ~~time~~ after total acquisition, the entire assets of Palos Verdes were lost, leaving the mere corporate shell. Under almost identical circumstances the Board in *J. D. & A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370, in deciding not to allow the consolidated return, was greatly influenced by the fact that the subsidiary (Tire Company) sustained the loss immediately after its acquisition by the parent company. The court had this to say (p. 375):

In our determination of this question, the close relationship between the time when petitioner acquired the stock of the Tire Co. for \$1, and the time when the Tire Co. sustained the loss of \$192,849.80 on the sale of its plant, seems very pertinent.

Lane's explanation for the sudden liquidation is not convincing. The purported sale to Dahlberg was supposedly in the expectation that he would immediately start building houses, thereby appreciating the value of the lots retained by Palos Verdes. (R. 503-504.) It was common knowledge, however, that war-time building restrictions barred any such plan, and Lane knew this. (R. 496-498.) The building restrictions were never lifted; they expired some years after the war. (R. 513.)

Lane would also have the Court believe that as of December 2, 1943, he did not know that under the terms

of the interlocutory decree the taxes had to be paid within six months (R. 405-406), and that, therefore, since American Pipe did not have the money to pay the taxes (R. 506, 509), the lots had to be sold. Lane knew of the existence of the interlocutory decree (R. 493), yet claimed ignorance of its most significant terms. His explanation seems all the more incredible in view of the fact that it was Mr. Dolley, American Pipe's lawyer, who had prepared the decree. (R. 61, 492.) The fact finder would be warranted in finding it unbelievable that the lawyer who handled these transactions for American Pipe did not advise Lane of the critical terms of the decree.

The Tax Court's conclusion that American Pipe's principal purpose of acquisition was tax avoidance is amply supported in the record.

3. *The letter of November 25, 1943*

On November 25, 1943, Lane wrote a letter to the board of directors of American Pipe in which he detailed several reasons for acquiring Palos Verdes. (R. 67-72.) It is urged that these were business reasons, some of which have been carried out. Reason number 3 was to tie the lots in with the construction of steel houses, and thus provide a controlled outlet for the sale of steel houses. (R. 70.) Number 4 was to use the lots for storage equipment which would then be loaned to consumers. (R. 70-71.) It was also suggested that some of the lots could be set aside for the distribution of liquified gas to enhance the volume of containers. (R. 71.) These three reasons required retention of at least a few of the lots. Yet Palos Verdes sold or lost all the lots. Only the corporate shell remained. Their actions drown out their words.

Reasons numbers 1 and 2 (R. 69-70) are immaterial. They in no way contemplate the use of Palos Verdes' property. To the contrary, they merely express the desire to have a corporate structure in which title to other property might occasionally be taken. There was no showing that it was necessary to own Palos Verdes to fulfill this desire. Any corporate structure would have sufficed. American Pipe could have organized a new corporation which would have served just as well, as Lane admitted. (R. 501-503.) Furthermore, the organization of a new corporation could have been accomplished for a very few dollars by way of comparison with the \$11,248 expended to acquire Palos Verdes. A business purpose contemplates that either the property or corporate structure has some unique business value to the acquiring corporation. There was nothing of inherent value in the corporate structure of Palos Verdes.

In 1947 Lane reacquired personally some of the lots lost by Palos Verdes. It is interesting to note that when asked why American Pipe did not reacquire these lots for its stated business purposes, he answered that his associates felt that (R. 457) "the real estate business was not germane to the steel business and they had no business having a subsidiary in the real estate business".

There is nothing in the letter of November 25, 1943, or in American Pipe's subsequent action, that detracts from the conclusion that American Pipe's principal purpose for acquiring Palos Verdes was tax avoidance.

4. The Tax Court's decision was based on an examination of the entire record

The taxpayer has used a considerable portion of his brief in an attempt to convince the Court that the Tax

Court did not found its decision on the record evidence. The claim is made that the decision was based solely on the facts recited in the court's findings, and that the findings were incomplete. But the decision was not based solely on the recited findings. The court stated that it reached its conclusion only "After a careful study of the record made". (R. 79.)

The Tax Court stated the familiar rule that it was the taxpayer's burden to prove that the Commissioner's determination was erroneous. The court concluded "After a careful study of the record made * * * that petitioner has not successfully carried his burden of proof". (R. 79.) The taxpayer has attempted to equate this statement with its conclusion that the Tax Court's decision rested solely on the presumption of correctness of the Commissioner's determination. But the Tax Court's statement that the burden of proof was not carried is not the equivalent of saying that the presumption was not rebutted.

This case is manifestly unlike *Hemphill Schools v. Commissioner*, 137 F. 2d 961 (C.A. 9th), where the Board of Tax Appeals treated the presumption as if it were evidence, weighing it against taxpayer's evidence, and concluding that taxpayer's evidence did not overcome the presumption. There the Board held that "The evidence does not overcome the determination of respondent", thus making the error of elevating the presumption to the status of evidence. Here the court merely concluded that "the evidence does not establish that respondent erred". (R. 75.) The court did not base its decision, as in the *Hemphill Schools* case, on any failure to overcome a presumption. Rather, the court concluded that the taxpayer had not carried its "burden

of proof". (R. 79.) This burden was to overcome, not the presumption, but the volume of evidence which supported the Commissioner's position. See Rule 32, Rules of Practice before the Tax Court of the United States; cases cited in 9 Mertens, Law of Federal Income Taxation, Secs. 50.61, 50.62. In view of the fact that the record, which comprises 656 printed pages plus some 80 exhibits, contains so much evidence which indicates tax avoidance, the contention that the decision rests on a presumption is completely devoid of merit.

Nor is it of any moment that the Tax Court did not undertake in its written opinion to analyze the entire record. The court was not obliged to analyze the evidence in detail. It is sufficient that its decision is supported by substantial evidence, as here, in which case it should not be disturbed on appeal. *Meadow Lamp & Imp. Co. v. Commissioner*, 124 F. 2d 297, 300 (C.A. 3d). See also *Helvering v. Rankin*, 295 U.S. 123, 132-133; *Montrose Cemetery Co. v. Commissioner*, 105 F. 2d 238, 245 (C.A. 7th); ~~*Hemphill Schools v. Commissioner*, 137 F. 2d 961 (C.A. 9th).~~

B. Regardless of Section 129, American Pipe was not entitled to file consolidated tax returns

Consider the case now without the application of Section 129. Here the taxpayer paid a premium for the stock of an unsuccessful, financially distressed corporation, known as a "loss corporation", in an attempt to offset the losses of the latter against its own profits and thereby avoid taxation. The danger to the Treasury of a scheme such as this is amply illustrated by the result which would occur if the position urged by the taxpayer in this case were adopted.

The predecessor of Palos Verdes was organized in 1921 to develop and promote real estate sales, but with little success. The original tracts of land, acquired at high prices, had lost much of their market value by 1935, when Palos Verdes was organized. Palos Verdes fared no better. The period from 1938 to 1943 was the worst in its financial history. (R. 53-54, 559-561, 586.) By 1942 its remaining lots were held by the State of California pursuant to tax sales, and subject to the liens of \$97,406. (R. 53.) By December 2, 1943, American Pipe had acquired all of the stock of Palos Verdes for \$11,248.96. (R. 60.) Before the end of December, 1943, some of the lots were purportedly sold to Dahlberg for \$18,000. (R. 62-63, 289-291.) By applying the historical cost of Palos Verdes' predecessor, the tax basis to Palos Verdes was \$250,781.80, and the resulting paper loss was \$232,781.80. (R. 64.) American Pipe offset this paper loss against its profits on the consolidated tax return for 1943, and carried the excess forward to offset its profits in 1944 and 1945. (R. 52-53.) In January, 1944, most of the remaining lots were sold at auction for \$16,185, the rest being lost for taxes to California within a few months thereafter. The historical basis to Palos Verdes was \$183,797.91, and the resulting paper loss was \$167,612.91. (R. 64-65.) This was reflected on the consolidated return for 1944, and carried forward as offsets against American Pipe's profits on the consolidated returns for 1945 and 1946. (R. 53.)

We refer to these losses as paper losses because neither American Pipe nor its stockholders actually incurred any loss at all. For that matter it is readily apparent that American Pipe actually realized an eco-

conomic gain, for Palos Verdes sold the lots for more than the stock cost American Pipe. In the strict legal sense losses did accrue to Palos Verdes. But in actuality they were suffered by the old stockholders of Palos Verdes who had sold their shares to American Pipe at a price which did not begin to approximate their capital contributions.

The question is whether under these circumstances American Pipe will be allowed to deduct the huge paper losses which neither it nor its stockholders incurred. An examination of the record will prove that the "principal purpose" which actuated the purchase of Palos Verdes stock was tax avoidance, and that, therefore, the losses must be disallowed to American Pipe because of Section 129. But even disregarding Section 129 for the moment, it is doubtful that the courts would allow Section 141 (the consolidated returns section) (Appendix, *infra*) to be so taken advantage of as to permit American Pipe, regardless of its reasons, to blatantly purchase \$400,394.74 worth of someone else's losses for \$11,248.96, and offset such fabricated losses against its own income. See *Woolford Realty Co. v. Rose*, 286 U. S. 319; *J. D. & A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370.

In *Woolford Realty Co. v. Rose*, *supra*, the taxpayer was denied the right to file a consolidated tax return and offset against its income the losses of its subsidiary Piedmont corporation suffered by Piedmont in the two years preceding the acquisition of its stock by the taxpayer. The Supreme Court had this to say (pp. 329-330):

Doubt, if there can be any, is not likely to survive a consideration of the mischiefs certain to be

engendered by any other ruling. A different ruling would mean that a prosperous corporation could buy the shares of one that had suffered heavy losses and wipe out thereby its own liability for taxes. The mind rebels against the notion that Congress in permitting a consolidated return was willing to foster an opportunity for juggling so facile and so obvious.

Allowing affiliated corporations to file consolidated returns has been recognized by Congress as sound in principle. It recognizes the business entity rather than the legal corporate separateness of the business operation. Inasmuch as it is ultimately the stockholders who suffer the gains or losses of the subsidiary, as well as those of the parent corporation, it would be unfair, where the affiliated group as a whole does not show a profit, to tax the profitable parent corporation separately without allowing the option to consolidate operations and thereby offset the losses of the unprofitable subsidiary. See congressional intent in permitting consolidated returns, set out in *J. D. & A. B. Spreckels Co. v. Commissioner, supra*, pp. 374-375. Basic to this reasoning is the thought that where the losses of the subsidiary actually cause an economic loss to the parent, offset against the parent's gains should be allowed.

However, where, as in the instant case, neither the parent corporation nor its stockholders have suffered any economic loss from the operations of the subsidiary, all reason for allowing consolidated returns vanishes. To rule otherwise would be to stretch the application of Section 141 to a situation far outside the scope of the congressional purpose. The Supreme Court, in the *Woolford Realty Co.* case, *supra*, would not countenance

such use of a consolidated return where it distorted the income picture of the parent.

True it is that in the *Woolford* case the loss had been incurred by the subsidiary Piedmont before its stock was acquired by the taxpayer. It was thus quite evident that the parent never really suffered the economic incidence of the loss. But it is no less evident that American Pipe did not incur the economic incidence of the loss in value of Palos Verdes' land. The real impact of the loss was felt by the old stockholders of Palos Verdes who held the stock as the land declined in value to almost worthlessness. Thus it may be said that the economic loss occurred before American Pipe acquired control, while the tax loss alone awaited the actual sale of the land for its realization. American Pipe purchased a corporation with a built-in loss feature awaiting only a taxable event, the sale, for its realization. After acquiring control, American Pipe wasted no time in causing Palos Verdes to realize the loss. Certainly the principle of the *Woolford* case is applicable here. American Pipe should not be entitled to file a consolidated return and thereby offset a loss, the economic incidence of which it never experienced.

J. D. & A. B. Spreckels Co. v. Commissioner, 41 B.T.A. 370, is a case in point. There the taxpayer for a nominal payment acquired all the stock of the Salvage Tire Company at a time when the latter had already contracted to sell its plant for a sizeable loss. The actual sale, and thus the realization of the loss, however, did not occur until after the taxpayer had gained control. The taxpayer then sought to offset the Tire Company's loss against its own profits on a consolidated tax return. The Board of Tax Appeals discussed the

Woolford case, recognizing that whether the affiliation there served a business purpose was not even considered, and concluded (p. 378) that—

If Congress did not intend that the privilege of making a consolidated return should be enjoyed by a corporation which acquired ownership of another corporation in order to take advantage of a loss already sustained by that corporation, it seems to follow that Congress did not intend that the privilege should be enjoyed by a corporation which acquired the ownership of another corporation in order to take advantage of a loss certain to be sustained by that corporation in the immediate future, * * *

In a related situation the Tax Court again recognized that a deduction arising out of a transaction among affiliates will be scrutinized to see whether the taxpayer bore the economic cost of the sought-for deduction. In *Ericsson Screw Machine Products Co. v. Commissioner*, 14 T.C. 757, the Tax Court, in denying the taxpayer the use of its transferor's basis for depreciating certain assets purportedly transferred pursuant to a plan of reorganization, pointed out (p. 764) the injustice of allowing the transferee to obtain the advantage of the transferor's basis—

where those who indirectly owned the assets while they declined in value have terminated all chances of recoupment of their loss and the corporation claiming the high basis is one in which those persons have no stock interest. Congress has indicated no intention * * * to give strangers to the loss in value of the assets a basis which would enable them

to reap whatever benefits the future might reveal from the use or disposition of the assets.

See also *Kimbell-Diamond Milling Co. v. Commissioner*, 14 T.C. 74, affirmed, 187 F. 2d 718 (C.A. 5th).

It should be observed that the privilege of filing a consolidated return, with the accompanying advantage of inter-company offsets, is a departure from the underlying rule that the tax statutes have always "disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, i.e., to treat them as personal to him and not transferable to or usable by another." *New Colonial Co. v. Helvering*, 292 U.S. 435, 440. The congressional purpose of limiting consolidated returns to that situation where the affiliated group as a whole has actually incurred an economic loss is given added meaning by Section 45 of the Code (Appendix, *infra*), where the Commissioner is authorized to distribute or allocate the gross income, deductions, or credits among the affiliated organizations in such a manner as to clearly reflect the income of the affiliates. See *Grenada Industries, Inc. v. Commissioner*, 17 T.C. 231, affirmed, 202 F. 2d 873 (C.A. 5th), certiorari denied, 346 U.S. 819.

Section 129 does not pre-empt the field. It was passed to foreclose a multitude of situations, where the acquisition of control of a corporation, or property of a corporation, results in making available to the acquiring person a deduction, credit, or allowance which would not otherwise have been enjoyed. The critical feature of Section 129 is that the acquisition must have been for the "principal purpose" of evading or avoiding tax. However, the reports of the congressional committees which handled the bill show that Section 129

was not intended to abrogate or supersede existing law, but rather to augment and bolster the decisions and sections already dealing with various problems of avoidance and distortion of income. The Senate Finance Committee Report stated that the principles established in *Higgins v. Smith*, 308 U.S. 473, and applied in *J. D. & A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370, and other cases, are to be observed. S. Rep. No. 627, 78th Cong., 1st Sess., pp. 58-60 (1944 Cum. Bull. 973, 1016-1017). The Conference Committee Report makes clear that Section 129 was not meant to supersede the principles already established in the cases, nor the requirements of Sections 45 and 141. H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 55-56 (1944 Cum. Bull. 1059, 1070). It is stated in 7A Mertens, Law of Federal Income Taxation, 1954 Cum. Pocket Suppl., Sec. 42.145(a), p. 300, in reference to Section 129 that "It is clear that there was no intention to supersede or detract from the effectiveness, as an avoidance preventative, of I. R. C., Sec. 45, or Supreme Court decisions dealing with intercorporate transactions and the corporate entity."

We conclude that the law was, before Section 129 was adopted, and still is, that since the scheme adopted by American Pipe grossly distorted the income of the affiliated corporations, it was not entitled to file consolidated tax returns regardless of its motives for acquiring the stock of Palos Verdes. *Woolford Realty Co. v. Rose*, 286 U.S. 319.

CONCLUSION

For the reasons advanced above, the decision of the Tax Court is correct and should be affirmed.

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NOVEMBER, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 45 [As amended by Sec. 128(b) of the Revenue Act of 1942³, c. 63, 58 Stat. 21]. ALLOCATION OF INCOME AND DEDUCTIONS.

In any case of two or more organizations, trades or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

(26 U.S.C. 1952 ed., Sec. 45.)

SEC. 129 [As added by Sec. 128(a) of the Revenue Act of 1943, *supra*]. ACQUISITIONS MADE TO EVADE OR AVOID INCOME OR EXCESS PROFITS TAX.

(a) *Disallowance of Deduction, Credit, or Allowance.*—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose

for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clause (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

(b) *Power of Commissioner to Allow Deduction, Etc., in Part.*—In any case to which subsection (a) is applicable the Commissioner is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

SEC. 141 [As amended by Sec. 159(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. CONSOLIDATED RETURNS.

(a) *Privilege to File Consolidated Income and Excess-Profits-Tax Returns*.—An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. * * *

* * * * *

(d) *Definition of "Affiliated Group"*.—As used in this section, an "affiliated group" means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 94 per centum of each class of the non-voting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the non-voting stock of at least one of the other includible corporations.

As used in this subsection the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

* * * * *

(26 U.S.C. 1952 ed., Sec. 141.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 20.129-1 [As added by T. D. 5426, 1945 Cum. Bull. 196.] *Meaning and Use of Terms.*—As used in section 1229 and in sections 29.129-2 to 29.129-5, inclusive—

(a) The term "allowance" refers to anything in the internal revenue laws which has the effect of diminishing tax liability. The term includes, among other things, a deduction, a credit, an adjustment, an exemption, or an exclusion.

(e) The term "person" includes an individual, a trust, an estate, a partnership, a company, or a corporation.

No. 15,174

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

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Subject Index

	Page
Preliminary statement	1
I. Petitioner established that legitimate business purposes, not tax avoidance, motivated its acquisition of Palos Verdes	1
II. Respondent made no effort to rebut the case established by petitioner, but the smear technique was effectively used in the Tax Court	4
III. Respondent fails to meet petitioner's arguments. Instead, he attempts to create a vaguely suspicious atmosphere based upon twisted facts	5
A. Respondent misrepresents petitioner's profit picture. The fact is that petitioner had no large past, present or prospective profits	7
1. Petitioner was in a precarious financial condition as a result of the termination of the chemical warfare contract	7
2. Petitioner was a small company with a history of losses and small profits and no immediate prospects of anything better	8
B. There was nothing fictitious about the losses reported on Palos Verdes' tax returns	10
C. The alleged agency of Archer is a false issue	11
1. Respondent is contradicted by his own deficiency notice	11
2. The alleged agency is immaterial	11
3. There was no evidence of such agency	12
4. No such agency was found	15
D. There was no "sudden liquidation" of Palos Verdes	15
1. The sale to Dahlberg showed tax stupidity, not tax motives	15
2. Respondent misstates the facts of the Dahlberg sale	16

	Page
3. The knowledge of an attorney of one client's affairs cannot be imputed to all other clients	17
4. Palos Verdes was utilized as a profitable subsidiary	18
E. The tremendous value of the Palos Verdes lots has been proved	19
F. Petitioner's business purposes could not have been accomplished by organizing a new corporation	20
G. Respondent misrepresents the reason why petitioner did not reacquire the Palos Verdes lots ...	21
H. The Edling incident is pointless	21
Argument	22
I. The Tax Court erroneously based its decision wholly upon an absent presumption in favor of respondent's determination	22
A. The decision was expressly predicated upon the inapplicable presumption	22
B. The Tax Court erred in relying upon the presumption	23
C. The Tax Court failed to give any consideration to the merits of the case independently of respondent's determination	23
D. Respondent has failed to meet this point	24
II. The Tax Court erroneously failed to consider material and undisputed evidence comprising a substantial part of petitioner's case	26
III. The findings of the Tax Court do not support its conclusion	27
IV. The decision of the Tax Court is not supported by the evidence	28
A. Petitioner affirmatively established that it did not acquire Palos Verdes for the principal purpose of avoiding taxes	28

SUBJECT INDEX

iii

	Page
B. The presumption in favor of respondent's ruling has no probative force	32
C. The Tax Court could not disregard petitioner's undisputed evidence	32
V. Respondent cannot sustain the decision on other grounds	35
Conclusion	39

Table of Authorities Cited

Cases	Pages
Commissioner v. Chelsea Products, Inc. (1952, 3rd Cir.), 197 F.2d 620	11, 36
Commodores Point Terminal Corp. (1948), 11 T. C. 411....	29
Crude Oil Corp. v. Commissioner (1947, 10th Cir.), 161 F.2d 809	25, 33
Ericsson Screw Machine Products Co. (1950), 14 T.C. 757..	38
Foran v. Commissioner (1945, 5th Cir.), 165 F.2d 705.....	33
Gillette's Estate v. Commissioner (1950, 9th Cir.), 182 F. 2d 1010	31, 32
Hemphill Schools, Inc. v. Commissioner (1943, 9th Cir.), 137 F.2d 961	24, 25
J. D. & A. B. Spreckels Co. (1940), 41 B.T.A. 370.....	38
J. M. Perry & Co. v. Commissioner (1941, 9th Cir.), 120 F.2d 123	25
R. P. Farnsworth & Co. v. Commissioner (1953, 5th Cir.), 203 F.2d 490	33
Simon J. Murphy Co. v. Commissioner (1956, 6th Cir.), 231 F.2d 639	37, 38
United States v. American Bell Telephone Co. (1896), 167 U.S. 224, 42 L.Ed. 144, 17 S.Ct. 809	35
Wiget v. Becker (1936, 8th Cir.), 84 F.2d 706	25
Woolford Realty Co. v. Rose (1931), 286 U.S. 319, 76 L.Ed. 1128	37
Wright-Bernet v. Commissioner (1949, 6th Cir.), 172 F.2d 343	33

Codes

Internal Revenue Code:

Section 45	37
Section 129	29, 30, 35, 38

TABLE OF AUTHORITIES CITED

v

	Page
California Revenue and Taxation Code:	
Sections 4216-4226	16
Sections 4256-4263 (repealed by Stats. 1955, ch. 381, p. 841, Section 3)	15
26 Code of Federal Regulations 39.192-3	30

Texts

Barnard, Acquisitions for Tax Benefit, 34 Cal.L.Rev.:	
Pages 36, 41-42	37
Pages 36, 43-44	38
7 Mertens, Law of Federal Taxation, Section 38.63, pages 124-125	37
West's Anno. Calif. Codes, Rev. and Tax. Code, pages 656-657	15

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

PRELIMINARY STATEMENT.

- I. PETITIONER ESTABLISHED THAT LEGITIMATE BUSINESS PURPOSES, NOT TAX AVOIDANCE, MOTIVATED ITS ACQUISITION OF PALOS VERDES.

Briefly stated, in 1942 one Archer started to acquire the capital stock of Palos Verdes Estates, Inc. (referred to as Palos Verdes) with the plan of interesting investors in advancing funds for the payment of back taxes on attractive residential lots owned by Palos Verdes in exchange for an interest in the company. Archer was acting for himself because the lots had tremendous potential value. He was unable to obtain financing, however, and on November 25, 1943, petitioner took action to acquire the Palos Verdes stock for itself for business reasons. On December 2, 1943, petitioner acquired all the stock of Palos Verdes then outstanding, and thereafter petitioner utilized Palos Verdes as a profitable and effective subsidiary. Based upon its acquisition and ownership of

the Palos Verdes stock, petitioner filed consolidated income tax returns in 1944, 1945 and 1946.

Respondent Commissioner made a determination that on or about December 2, 1943, petitioner acquired all of the capital stock of Palos Verdes, that such acquisition was for the principal purpose of avoidance of Federal income and excess profits taxes by securing the benefit of deductions, credits or other allowances of Palos Verdes which petitioner would not otherwise enjoy. (Tr. pp. 30-31.)

A petition for redetermination of deficiencies was duly filed in the Tax Court and, in support thereof, petitioner proved that legitimate business reasons, not tax avoidance, motivated its acquisition of Palos Verdes. Specifically, petitioner proved the following:

A. *Legitimate business purposes motivated its acquisition of Palos Verdes.*

1. Petitioner's business purposes in acquiring Palos Verdes were set forth in its corporate action duly taken. (The evidence is set forth in our opening brief, pp. 7-12.)

2. On the same day Palos Verdes was acquired, petitioner's president worked out a program for the profitable sale of lots. (Op. Br., pp. 13-14.)

B. *The utilization of Palos Verdes by petitioner as a profitable subsidiary confirms the business purpose of its acquisition.*

1. Petitioner almost immediately realized a profit of 33% on its investment by sales of Palos Verdes lots. (Op. Br., pp. 14-15.)

2. Petitioner caused Palos Verdes to replace its lots with other properties calculated to afford petitioner the same outlet for its products and for expansion of its activities. (Op. Br., pp. 15-19.)

3. In furtherance of petitioner's plans for expansion of its oil well equipment business, Palos Verdes acquired profitable oil leases. (Op. Br., pp. 19-20.)

4. Palos Verdes also leased and operated an oil refinery in order to effectuate petitioner's plans for expansion of its oil equipment business. (Op. Br. pp. 20-21.)

5. In addition, petitioner's oil equipment business was promoted by Palos Verdes' acquisition of a boat for charter to oil companies engaged in geological work off the Coast. (Op. Br., pp. 21-22.)

6. Acquisition of Palos Verdes provided a highly profitable outlet for disposal of Chemical Warfare containers when the original plan for their use could not be carried out. (Op. Br., pp. 22-24.)

C. *Experience has demonstrated the good faith and sound judgment of petitioner in making its decision to acquire the Palos Verdes lots. The tremendous potential value of such lots has been realized. (The evidence is summarized at pages 24-25 of our opening brief.)*

D. *Petitioner established that it had no motive whatever for the acquisition of Palos Verdes as a "tax loss" corporation, in that petitioner had no large past, present or prospective profits or high earning assets. (Op. Br., pp. 26-28.)*

II. RESPONDENT MADE NO EFFORT TO REBUT THE CASE ESTABLISHED BY PETITIONER, BUT THE SMEAR TECHNIQUE WAS EFFECTIVELY USED IN THE TAX COURT.

At the outset of the trial, respondent seemingly realized that he could not produce any evidence of predominate tax avoidance motives on the part of petitioner as charged in the deficiency notice. To overcome his lack of evidence, respondent sought to create an atmosphere of suspicion by making baseless charges and insinuations concerning matters wholly unconnected to the issue of petitioner's purpose in acquiring the stock of Palos Verdes. This technique was typified by the inflammatory opening statement made by respondent's counsel. The following are examples of the unfounded and illogical accusations so made:

“Now, in this escrow arrangement that was opened in August of 1943, Mr. Archer appears as nominee. He never represented himself, the facts will show, as anything other than a nominee, not a principal, but an agent.” (Tr. pp. 107-108.)

“The evidence will show . . . that Mr. Archer . . . when he ran upon a shareholder who was unduly suspicious of his motives, represented to them that he represented a defense plant engaged in war contracts, and that the only reason why his principal was interested in this stock was in order to broaden its tax base under consolidation of operations.” (Tr. pp. 108-109.)

These charges were baseless. As we have pointed out (Op. Br., p. 49), respondent made no serious effort to rebut the case established by petitioner and he certainly failed to produce any evidence of accusations such as those quoted.

The fact is that the escrow was opened and maintained by Archer individually (Tr. pp. 636-641; Exs. 51, 52, 53) and he never acted for anyone else in connection therewith. (Tr. pp. 146, 175, 214, 232.) Neither did he attempt to resell the Palos Verdes stock to a defense plant as that of a tax loss corporation. (Tr. pp. 178, 181, 182.)

More important, respondent made no effort to show how these charges, even if true, could have any bearing on the ultimate issue in the case, namely, petitioner's purpose in acquiring the Palos Verdes stock.

Respondent succeeded admirably, however, in creating a vague impression that somebody had some sinister motive of some kind at some point. Indeed, respondent's technique succeeded so well that, at the beginning of the testimony of petitioner's president, the trial judge remarked (Tr. p. 337):

“The Court. I have already formed my impression of Mr. Lane, before he took the stand.”

III. RESPONDENT FAILS TO MEET PETITIONER'S ARGUMENTS. INSTEAD, HE ATTEMPTS TO CREATE A VAGUELY SUSPICIOUS ATMOSPHERE BASED UPON TWISTED FACTS.

Respondent makes no effort to meet the points argued in our opening brief. The documentary evidence shows that petitioner's business purposes in acquiring Palos Verdes were set forth in its corporate action duly taken and respondent cannot deny it. (Pet. Op. Br., pp. 7-12.) The documentary evidence further shows that on the same day Palos Verdes was acquired, petitioner's president worked out a program for the profitable sale of its lots

(Pet. Op. Br., pp. 13-14), a fact which respondent neglects to mention. The undisputed evidence was that, upon acquisition of Palos Verdes, petitioner utilized it as a profitable subsidiary in numerous ways (Pet. Op. Br., pp. 14-24), but that evidence is largely omitted from the findings of fact and is entirely disregarded in respondent's brief.

It was established without contradiction that the Palos Verdes lots had great value and that such value had been proved by subsequent experience. (Pet. Op. Br., pp. 24-25.) Respondent cannot meet this evidence so he ignores it.

The overwhelming factor which respondent cannot answer is that petitioner had no tax motive whatever in the acquisition of Palos Verdes because petitioner's financial position was extremely poor. Respondent seeks to overcome this factor by misrepresenting the evidence relative to petitioner's financial condition or, failing in that approach, by arguing, in the face of his own deficiency notice and of uncontradicted evidence to the contrary, that Archer was acquiring the stock for petitioner when its profit prospects were better.

In substance, respondent seeks to create the same atmosphere of vague suspicion in this Court by methods similar to those used in the Tax Court, particularly by (a) the use of contemptuous epithets in referring to uncontradicted evidence, (b) twisting the facts so that they may appear in what is supposed to be a vaguely sinister light, and (c) misrepresentations of the evidence.

In addition, respondent attempts to sustain the decision of the Tax Court by undertaking a complete change

of position. He argues that petitioner was not entitled to file consolidated tax returns regardless of Section 129 of the Internal Revenue Code (Resp. Br., p. 39) and that his determination may be upheld as a distribution or allocation of gross income, deductions or credits under Section 45 of the Code (Brief, p. 45). This contention is made notwithstanding the fact that the deficiency notice did not specify any such grounds (Tr. pp. 30-31), the decision under review was based solely on Section 129 (Tr. pp. 75-79) and the position argued by respondent in the Tax Court was just the opposite. (Tr. pp. 110-111.)

The mechanics of respondent's technique are further analyzed below.

A. Respondent misrepresents petitioner's profit picture. The fact is that petitioner had no large past, present or prospective profits.

1. Petitioner was in a precarious financial condition as a result of the termination of the chemical warfare contract.

Flagrant misstatements made by respondent are that on December 2, 1943, when petitioner acquired Palos Verdes, "no loss on the chemical warfare contract could have been anticipated" and that "American Pipe's financial outlook was bright" at that time. (Resp. Brief, pp. 31, 33.)

The fact is that in the latter part of 1943 petitioner was facing a huge loss as the result of the contract termination. The only testimony on that issue was by Mr. Lane. He stated that the loss was originally estimated at \$350,000 to \$400,000, that, when the amount of petitioner's claim was subsequently determined, the loss was estimated at over \$600,000, and that the final settle-

ment of the claim did not occur until the last week in December. (Tr. pp. 373-375.) The first indication was that the Government would pay only \$600,000 on the claim and later indications were that \$800,000 was the top figure. (Tr. p. 373.)

Petitioner's outstanding loan, necessitated by the contract, was \$1,020,070.82; in addition, petitioner had an actual cash investment in the contract over and above the borrowed funds in the amount of \$368,970.31; further, petitioner's accounts receivable had been assigned to the bank under the requirements of the loan, and the cancellation of the contract left petitioner without operating funds. (Tr. pp. 427-429.) The final settlement resulted in a loss of \$116,240.30 to petitioner; that loss was reported on petitioner's income tax returns of 1943 and cannot be questioned. (Jt. Ex. 40-C.) Petitioner's net income for 1943 was a meager \$16,880.52. (Tr. p. 52.)

Contrasted with respondent's assertions, therefore, the fact is that petitioner's financial position in December, 1943, was extremely bleak. In fact, it bordered on the disastrous.

2. Petitioner was a small company with a history of losses and small profits and no immediate prospects of anything better.

With an utter disregard for the facts established by the evidence, respondent asserts that petitioner "had substantial earnings from war contracts", that it had "war profits", that in 1942 petitioner's "prospective earnings picture was very encouraging", that "This Court may take judicial notice that American Pipe was certain to obtain war contracts", that "there was every reason to

believe that other contracts would quickly fill the place of the chemical warfare contract", that "the Tax Court could well infer that additional defense contracts would quickly fill the temporary gap, as indeed they did" and that petitioner was "certain" to have "huge profits." (Resp. Brief, pp. 26, 32, 33.)

The fact is that petitioner could hardly be compared with General Motors. It had no large past, present or prospective profits on December 2, 1943, when Palos Verdes was acquired, nor did it have any high earning assets. Petitioner:

"was a small company. And they had had a record of losing money for a number of years, back to 1929, ten or eleven or twelve years." (Tr. p. 338.)

The fact is that petitioner had net profits of only \$2,416.33 in 1940, \$54,633.62 in 1941 and \$48,101.11 in 1942. (Jt. Ex. 40-C; Tr. p. 482.)

The fact is that petitioner had never had any substantial war contracts other than the chemical warfare contract. (Tr. pp. 352-353.) The largest such contract awarded to petitioner in 1943 amounted to only \$32,369.76. (Ex. 31.)

The fact is that, upon termination of the chemical warfare contract in 1943, petitioner was faced with a huge loss, a loss originally estimated at \$350,000 to \$400,000, subsequently estimated at \$600,000 (Tr. pp. 373-374), and finally fixed at \$116,240.30. (Jt. Ex. 40-C.) The fact is that petitioner's accounts receivable were pledged to the bank under the terms of a loan exceeding a million dollars, and petitioner was without operating funds. (Tr. pp. 428-429.)

The fact is that the total backlog of war contracts which petitioner had outstanding on December 31, 1943, was the trivial amount of \$850. (Ex. 31.)

The fact is that petitioner did not receive any further war contracts of any size until the latter part of 1944. (Ex. 44.)

Finally, the fact is that the Tax Court did not infer that "additional defense contracts would quickly fill the temporary gap". In conformity with the uncontradicted evidence, the Tax Court found only that substantially all of the war contracts subsequently awarded to petitioner were awarded on or after July 15, 1944, and that the largest contract awarded prior to May 12, 1944, was for \$1,800. (Tr. p. 75.)

It is absolutely essential to respondent's position that he ignore the foregoing facts since they are completely inconsistent with his determination. In substance, there was nothing in petitioner's past, present or foreseeable future on December 2, 1943, which presented any particular problem with respect to income or excess profits taxes.

B. There was nothing fictitious about the losses reported on Palos Verdes' tax returns.

The fact that Palos Verdes actually sustained the losses in the amounts reported on its tax returns was first questioned by respondent (Tr. pp. 47-48) and then conceded, in that the issue was abandoned by respondent. (Stipulation, paragraph 16; Tr. pp. 51, 111-112.) Nevertheless, in pursuance of his smear tactics, respondent persists in referring to such losses as "fabricated losses" and "huge paper losses." (Resp. Brief, pp. 26, 41.) His

brief is permeated with similar efforts to dismiss uncontradicted evidence and conceded facts with such smears.

C. The alleged agency of Archer is a false issue.

Apparently sensing the futility of his attempt to misstate petitioner's profit picture in December, 1943, respondent asserts that petitioner actually obtained a majority of the Palos Verdes stock at an indefinite earlier date through the services of Archer. (Resp. Brief, pp. 28, 29, 30, 31.) This is but another aspect of respondent's smear technique because (1) the deficiency notice was not based upon any such acquisition, (2) the alleged agency of Archer has no bearing on the case, (3) there was no evidence of any such agency, and (4) no such agency was found.

1. Respondent is contradicted by his own deficiency notice.

Respondent's notice of deficiency was not based upon any supposed acquisition of the Palos Verdes stock, through Archer or otherwise, in 1942 or at any time in 1943 before December 2nd. It was based solely upon the theory that petitioner made the acquisition "on or about December 2, 1943," for the principal purpose of avoiding taxes (Tr. pp. 30-31) and it was this determination which the Tax Court "affirmed." (Resp. Brief, p. 18.) Respondent cannot sustain his determination on a different theory. (*Commissioner v. Chelsea Products, Inc.* (1952, 3rd Cir.), 197 F.2d 620, 624.)

2. The alleged agency is immaterial.

Very little effort is made by respondent to show how any supposed agency has any materiality here. Indeed,

he concedes that such fact would "make very little difference." (Resp. Brief, p. 33.) The point is raised largely for its supposed effect of creating a vague impression of something sinister. The fact is that this case could not involve any secret agency or concealed income or other question of tax evasion. It involves, instead, the acquisition and ownership of a subsidiary, openly proclaimed and asserted. The acquisition and ownership must be open because that is the very basis of the consolidated tax returns filed by petitioner.

3. There was no evidence of such agency.

Archer testified that he was acting for himself and not as anyone's agent. (Tr. pp. 146, 175, 214, 232.) The documentary evidence confirmed his testimony. (Tr. pp. 639-641.) It was further shown that, by letter of May 25, 1943, Archer unsuccessfully attempted to interest petitioner in investing in the Palos Verdes project. (Ex. 6; Tr. pp. 161-162.) The letter was not impeached or questioned.

Respondent, however, seeks some comfort in the fact that the offer to stockholders, mimeographed by Haggott (Tr. p. 214), referred to "R. P. Archer, Nominee." (Resp. Brief, p. 29.) But no effort is made to show how any such representation by Haggott or even by Archer, without the knowledge of petitioner, could be binding upon petitioner or could even relate to petitioner.

It is also contended that Archer paid a "premium price" for the Palos Verdes stock and that this shows that "American Pipe would be willing to pay a premium for the tax losses it was purchasing." (Brief pp. 33, 39.)

The logic of this argument is wholly unsound. Even if Archer had paid a “premium price”, how could that tend to prove predominating tax motives on the part of petitioner? Moreover, it is absurd to characterize \$2 a share as a “premium price” for any stock. Finally, there was no showing that Archer or any other person could have acquired the stock for any less price. The so-called market price merely reflects what willing buyers, if any, would pay to willing sellers, if any, for such stock as may be put on the market. It does not show the price at which most or all of the stock could be acquired, including acquisitions from unwilling sellers. There was no indication that any substantial amount of the stock could have been purchased for anything less than \$2 a share. In fact, it required a period of eight months to a year for Archer to purchase only about two-thirds of the stock even at that “premium price” and it was a “slow process.” (Tr. p. 158.)

Respondent asserts that “Archer knew that 51 per cent of the stock was a controlling interest, and had no explanation of why he insisted on 100 per cent” (Resp. Brief, p. 8) and that he turned the Palos Verdes stock over to petitioner in consideration of the cancellation of his indebtedness when he “suddenly realized that he could not raise the money to pay the taxes.” (Brief, p. 30.)

The fact is that Archer never undertook to pay the back property taxes himself. His plan was to interest investors in the Palos Verdes project (Tr. pp. 186-188) and that is what he attempted to do. He discussed the matter with several potential investors, but they would

not commit themselves until he had control of the company and could make a concrete offer. (Tr. pp. 189-190, 231, 238, 262.) Archer even attempted to interest petitioner in investing in the project in May, 1943, but without success. (Ex. 6; Tr. pp. 161-162, 238.)

It was due to the necessity of bringing outside investors into the project that Archer needed more than 51% of the stock; he could not sell part of his interest and still retain control or any substantial part of Palos Verdes otherwise. He explained this fully in his testimony. (Tr. p. 237.)

Finally, respondent argues that "Ostensibly" Archer was hired to expedite the chemical warfare contract "after his sole contact of influence was seen to be useless", that "The record does not abound with descriptions of Archer's work as an expediter", that "His label as an expediter was a sham" and that, therefore, Archer must have been hired to acquire the Palos Verdes stock for petitioner. (Resp. Brief, pp. 27-28.)

This is a horrible example of respondent's technique of making unreasonable deductions from twisted facts. The fact is that Mr. Lane thought that he was going to get a chance at the chemical warfare contract, and it would mean considerable travel for him, although the awarding of the contract was by no means certain. (Tr. pp. 345, 359.) The fact is that Archer was hired by petitioner to assist Mr. Lane by expediting production and that is exactly what he did. The fact is that Archer testified at length as to work in controlling production, meeting schedules, obtaining materials, placing work with

subcontractors, getting work through inspections and obtaining priorities. (Tr. pp. 140-142.)

4. No such agency was found.

The decision of the Tax Court was not based upon any supposed secret agency or conspiracy as is suggested by respondent. The findings were in accordance generally with the uncontradicted evidence, that is, that all shares were acquired by Archer for himself up to November 25, 1943, when petitioner resolved to make the acquisition itself. (Tr. pp. 56, 57, 60.)

D. There was no "sudden liquidation" of Palos Verdes.

1. The sale to Dahlberg showed tax stupidity, not tax motives.

There was no mysterious "sudden liquidation" of Palos Verdes, as respondent suggests. (Brief, p. 35.) The terms of the interlocutory decree in the Palos Verdes tax suit provided that the property taxes had to be paid within six months after the decree became final; the normal period of redemption was not recognized. (Jt. Ex. 1-A.) Mr. Lane did not learn of the limited redemption period provided in the decree until after petitioner had acquired the Palos Verdes stock; he naturally assumed that the normal period of redemption would apply. (Tr. pp. 405-406, 492-493.) It was for that reason that he was willing to enter into the transaction with Dahlberg. (Tr. p. 406.) *Otherwise, the lots would have been lost for taxes anyway.* Lane had originally planned to pay off the property taxes in installments on the ten-year plan.¹ (Tr. p. 491.)

¹The ten-year installment plan was formerly set forth in the California Revenue and Taxation Code, secs. 4256-4263, repealed by Stats. 1955, ch. 381, p. 841, sec. 3; see West's Anno. Calif. Codes, Rev. and Tax. Code, pp. 656-657.

American Pipe's lawyer, who had prepared the decree" and the "fact finder would be warranted in finding it unbelievable that the lawyer who handled these transactions for American Pipe did not advise Lane of the critical terms of the decree." (Brief, p. 36.)

Respondent's sophistry is matched only by his twisting of the facts. The Tax Court found only that Mr. Dolley's clients included both petitioner and Palos Verdes; it did not find that Mr. Dolley "handled these transactions for American Pipe" or that he informed one client of the affairs of the other one. (Tr. p. 61.) The uncontradicted evidence was that Mr. Dolley was one of two attorneys employed by petitioner in 1942 and 1943 (Tr. p. 492), that he did not advise Mr. Lane of the terms of the decree (Tr. p. 492), that Mr. Dolley was hired by Archer to bring the tax suit on behalf of Palos Verdes (Tr. p. 205) and that Mr. Dolley had previously represented Archer in connection with his divorce action. (Tr. p. 206.) There was no evidence that Mr. Dolley had anything to do with petitioner's acquisition of Palos Verdes.

The mere fact that an attorney represents several clients does not charge each client with knowledge of all the affairs of the others, and especially not in the face of direct and uncontradicted evidence to the contrary.

4. Palos Verdes was utilized as a profitable subsidiary.

Respondent's "sudden liquidation" argument completely ignores the evidence as to petitioner's continued profitable utilization of Palos Verdes as a subsidiary. (Pet. Op. Br., pp. 14-24.)

E. The tremendous value of the Palos Verdes lots has been proved.

Respondent alleges that the old stockholders of Palos Verdes held the stock "as the land declined in value to almost worthlessness." (Brief, p. 43.) No transcript references are given for this assertion because it cannot be sustained by the record.

The fact is that the Palos Verdes lots had values far in excess of the amount of delinquent property taxes on them, but the company had been the victim of poor promotion. (Tr. pp. 130-131.) The lots had sold for more than \$500 each and some had been sold for as much as \$10,000 to \$15,000 a lot (Tr. p. 169), whereas the taxes amounted to less than \$150 per lot. (Tr. pp. 133-134.)

Subsequent events have demonstrated beyond any question that huge profits could be made on the development and sale of the Palos Verdes lots, just as Mr. Lane calculated on December 2, 1943. (Ex. 24; Tr. pp. 417-418.)

Of the some 300 lots now owned personally by Mr. Lane (Tr. pp. 454-456), he has been offered \$90,000 for 75 of them and \$150,000 for the remainder of the lots: those are wholesale prices offered by responsible real estate builders. (Tr. p. 456.) Mr. Towle, a real estate broker who had been in business in the Palos Verdes area since 1921 (Tr. pp. 530-531), testified that lots in that area were worth \$1,200 to \$2,250 by 1948 or 1949. (Tr. pp. 543-545.) Some lots there are now valued at \$3,500. (Tr. pp. 532, 546.) A house purchased for \$12,500 in 1942 was sold for \$47,500 in 1950 and is now offered for sale at \$65,000. (Tr. p. 550.) In 1954, an undeveloped tract of 73 lots in the Palos Verdes area was sold for \$110,000. (Tr. pp. 551-552.)

F. Petitioner's business purposes could not have been accomplished by organizing a new corporation.

The business reasons prompting petitioner's acquisition of Palos Verdes were set forth in Mr. Lane's letter of November 25, 1943, and were restated in his testimony at the trial. (Ex. 20; Tr. pp. 391-396.) As we have shown (Op. Br. pp. 14-24), petitioner actively utilized Palos Verdes as a profitable subsidiary. Respondent asserts, however, that "Lane admitted on cross-examination that the stated advantages would largely have been available to American Pipe by forming a new corporation." (Brief, pp. 12-13.)

Respondent is mistaken. Mr. Lane's testimony was only that acquisition of Palos Verdes was not *absolutely essential* to some of the purposes, though such acquisition was certainly more advantageous than forming a new company. He pointed out that, "if a person had the capital to go out and buy property, they could have organized their own corporation, but this corporation had 700 lots at \$10 a lot" (Tr. p. 501), that a profit of \$8 or \$10 a lot could be made on the sale of water pipe alone in Palos Verdes (Tr. p. 501) and that, with respect to expansion of petitioner's oil well supply business, "we could have organized another company but it would not have been as practical as having a company that already had those assets that you were buying for two cents on the dollar." (Tr. p. 503.)

Respondent's argument completely disregards the huge profits which could have been made on the development and sale of the lots but for the peculiar redemption terms of the decree in the tax suit.

G. Respondent misrepresents the reason why petitioner did not reacquire the Palos Verdes lots.

It is twice asserted that petitioner did not reacquire such lots at the 1947 tax sale because Mr. Lane's business associates felt that the real estate business was not germane to the steel business. (Rep. Brief, pp. 15, 37.)

These statements are directly contrary to the evidence. It was the agents of the Internal Revenue Service, not the business associates of Mr. Lane, who made that claim. After repeated objections to such evidence by respondent's counsel, the following occurred (Tr. p. 459):

“Q. . . . Mr. Lane, . . . will you state whether or not you or your associates were under the impression in 1947 by reason of the investigation . . . and audit that had been made by the Internal Revenue Service, that it would not be advisable for you to reacquire real estate in the name of American Pipe and Steel Corporation?”

“Mr. Chase. . . . I object to that. The question is irrelevant and immaterial and there is no issue in the case as to American Pipe and Steel Corporation being engaged in the real estate business. . . .

“The Witness. The answer is yes.”

H. The Edling incident is pointless.

Respondent seeks to inject a quality of mystery into the rather pointless testimony of Mr. Edling, a public accountant. (Brief, p. 16.) This testimony was merely that he was a member of an accounting firm which did work for petitioner (Tr. p. 571), that Exhibit T had his signature (Tr. p. 572), and that he did not remember anything about the incident (Tr. p. 573). The exhibit was a receipt given to one Roy W. Burton for some papers

of Palos Verdes. (Tr. p. 573.) The papers were not produced and it does not appear what they contained. The witness did not recall any reason for taking the papers unless somebody asked him to pick them up as a favor, and the only person he could think of was Mr. Lane. (Tr. p. 573.)

Of course, as respondent elsewhere admits (Brief, p. 29), petitioner had a legitimate interest in the affairs of Palos Verdes inasmuch as petitioner had agreed to loan funds to Archer for the purchase of the stock.

ARGUMENT.

I.

THE TAX COURT ERRONEOUSLY BASED ITS DECISION WHOLLY UPON AN ABSENT PRESUMPTION IN FAVOR OF RESPONDENT'S DETERMINATION.

A. The decision was expressly predicated upon the inapplicable presumption.

The Tax Court failed to make any findings of fact regarding petitioner's purpose in acquiring Palos Verdes. It relied, instead, wholly upon respondent's determination of deficiencies, as shown by the conclusion of both its "Findings of Fact" (Tr. p. 75: ". . . the evidence does not establish that respondent erred . . .") and of its "Opinion" (Tr. p. 79: ". . . it was petitioner's burden to prove that such determination was erroneous . . . we have concluded that petitioner has not successfully carried his burden of proof.').

As respondent concedes (Brief, p. 18), the Tax Court merely "affirmed the Commissioner's determination" as if it were a reviewing Court.

B. The Tax Court erred in relying upon the presumption.

The decision of the Tax Court is erroneous because it disregards the following principles: (1) The presumption in favor of the Commissioner's determination is merely a presumption of law affecting only the burden of proof; it is not an inference of fact nor does it have any probative force. (2) The effect of the presumption is merely to require the taxpayer to present a *prima facie* case contradicting the determination. (3) The presumption disappears when the taxpayer has introduced substantial evidence contrary thereto; thenceforth the issue depends wholly upon the evidence. (4) Upon the disappearance of the presumption, it became the duty of the Tax Court to decide for itself, from the evidence alone, whether or not petitioner's principal purpose in acquiring Palos Verdes was tax avoidance.

These principles are established by the decisions heretofore cited. (Op. Br., pp. 33-37.)

C. The Tax Court failed to give any consideration to the merits of the case independently of respondent's determination.

The Court's failure to consider the merits of the case is shown by the following points: (1) The fact that the conclusion was expressly predicated upon respondent's determination alone. (Tr. p. 75.) (2) The incomplete and disorganized recital of some evidence in the "Findings of Fact" without any attempt at analysis or evaluation of its relevance, importance or effect. (3) The failure to find any ultimate facts relating to the primary issues in the case. (4) The fact that the decision at the end of the "Opinion" was based solely upon respondent's determination. (Tr. p. 79.) And (5) the Court's failure

to discuss, analyze or list any reasons or grounds for its decision other than the fact that the Commissioner had made a determination adverse to petitioner.

D. Respondent has failed to meet this point.

The only decision cited by respondent on this point is *Hemphill Schools, Inc. v. Commissioner* (1943, 9th Cir.), 137 F.2d 961, which he seeks to distinguish upon the basis of a slight variation in language. (Resp. Brief, p. 38.) But this is plainly a distinction without a difference. If "the evidence does not establish that respondent erred" (Tr. p. 75), then the evidence necessarily "does not overcome the determination of respondent." (*Hemphill Schools, supra*, 137 F.2d at 963.) The one is the equivalent of the other. Moreover, here the Tax Court expressly based its decision on the theory that petitioner failed to prove that respondent's determination was erroneous. (Tr. p. 79.)

Respondent also contends that "the Tax Court's statement that the burden of proof was not carried is not the equivalent of saying that the presumption was not carried" and that petitioner's "burden was to overcome, not the presumption, but the volume of evidence which supported the Commissioner's position." (Brief, pp. 38-39.) These contentions are erroneous for three reasons:

First: The Tax Court did not hold that petitioner had failed to overcome any supposed "volume of evidence." It held only that petitioner had failed to overcome respondent's determination:

"The Commissioner having determined that the tax benefit to be gained was the principal purpose be-

hind that acquisition, *it was petitioner's burden to prove that such determination was erroneous*. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof." (Tr. p. 79.) (Emphasis added.)

Second: There was no "volume of evidence which supported the Commissioner's position." The testimony of his four witnesses was cursory only and did not tend to rebut petitioner's case. (Tr. pp. 571-575, 575-585, 585-596, 621-633.)

Third: The statement that the petitioner failed to carry the burden of proving the Commissioner's determination erroneous is equivalent to saying that the presumption was not rebutted. (*Wiget v. Becker* (1936, 8th Cir.), 84 F.2d 706, 707, 708.) This is true because the taxpayer's burden in this respect is only to produce substantial evidence contrary to the determination. (*Hemphill Schools, supra*, 137 F.2d 961, 964.) The presumption disappears when evidence sufficient to support a contrary finding has been introduced (*Crude Oil Corp. v. Commissioner* (1947, 10th Cir.), 161 F.2d 809, 810) and thenceforth the issue depends wholly upon the evidence (*J. M. Perry & Co. v. Commissioner* (1941, 9th Cir.), 120 F.2d 123, 124.)

Finally, it is argued that the Tax Court need not analyze the record; that it is sufficient if its decision is supported by substantial evidence. (Resp. Brief, p. 39.) *Hemphill Schools* was first cited for this proposition and was then crossed out (Brief, p. 39) because that case decided just the opposite. The point is that, even if the Tax Court's decision were supported by substantial evi-

dence (and in this case it is not), the decision must nevertheless be reversed in a case, as here, where the Court has failed to consider the case on the merits after the presumption is dissolved.

II.

THE TAX COURT ERRONEOUSLY FAILED TO CONSIDER MATERIAL AND UNDISPUTED EVIDENCE COMPRISING A SUBSTANTIAL PART OF PETITIONER'S CASE.

The fact is that, upon the acquisition of Palos Verdes, petitioner utilized it in numerous ways as an effective and profitable subsidiary. (Op. Br., pp. 14-24.) And subsequent experience has demonstrated the good faith and sound business judgment of petitioner in acquiring the Palos Verdes lots. (Op. Br., pp. 24-25.) But none of these facts were considered or mentioned in the findings or opinion of the Tax Court. The "ultimate conclusion" of the Court was expressly based upon "the foregoing facts" (Tr. p. 75), that is, upon the pieces of evidence set forth in the findings.

Respondent's answer to this point is that, at the end of the "Opinion", the Tax Court referred to "a careful study of the record made." (Brief, p. 38.) But the Court merely referred back to its "ultimate conclusion" at the end of the findings; it stated that "we have concluded" and "We have accordingly so found." (Tr. p. 79.)

And if it is true, as respondent contends (Brief, p. 38), that "the decision was not based solely on the recited findings," then it must necessarily follow that the findings do not sustain the decision.

III.

THE FINDINGS OF THE TAX COURT DO NOT
SUPPORT ITS CONCLUSION.

The only point decided by the Tax Court was that petitioner had failed to produce any substantial evidence tending to overcome respondent's determination. (Tr. pp. 75, 79.) That decision does not find support even in the incomplete findings for these reasons: (1) The Court failed to find any ultimate facts which would sustain its conclusion. (2) The evidentiary findings made sustain the contrary conclusion.

Respondent seemingly concedes these points for he states that "the decision was not based solely on the recited findings." (Brief, p. 38.) It is also said that the question of petitioner's purpose in acquiring Palos Verdes was one of fact to be found by the trial judge. (Brief, p. 23.) If this be true, then our position must be sustained, for no finding was made on that issue.

Respondent makes various other contentions as to what he thinks *could* be found, but, assuming the validity of his contentions, the fact remains that no such findings were made. It is contended, for example, that Archer was an agent of petitioner so that all his activities were in reality attributable to petitioner. (Brief, p. 27.) Even if this argument amounted to anything but a smear attempt, the fact is that it is contrary to the undisputed evidence and it is also contradicted by the findings. It was found that *Archer* was interested in the possibilities of profit to be made on the Palos Verdes lots, that petitioner agreed to *lend* money to Archer for his acquisition of the stock, that the stock escrow account was opened

by Archer individually, and that “some 2,500 shares of Palos Verdes stock *were obtained by Archer* through the escrow procedure.” (Tr. pp. 56-57.)

Other arguments of respondent are that on December 2, 1943, petitioner’s financial outlook was bright (it had no war contracts and was facing a huge loss), that no loss on the chemical warefare contract could have been anticipated (a loss of up to \$600,000 *was* anticipated), and that the Tax Court could infer that petitioner would quickly obtain additional defense contracts (petitioner had no other large contracts and did not obtain any until the latter part of 1944). (Brief, pp. 33, 31, 32.) All such arguments are advanced in the face of undisputed evidence to the contrary and none of them finds any support in the findings.

In no instance has respondent pointed to any finding of any ultimate facts or of any facts which would lead to, or provide support for, the decision of the Tax Court. The evidentiary findings, although incomplete, support the contrary conclusion.

IV.

THE DECISION OF THE TAX COURT IS NOT SUPPORTED BY THE EVIDENCE.

- A.** Petitioner affirmatively established that it did not acquire Palos Verdes for the principal purpose of avoiding taxes.

As we have shown (Op. Br., pp. 7-24), pursuant to the program presented by its president in his November 25th letter, petitioner acquired Palos Verdes for the purpose of utilizing it as an effective and profitable sub-

subsidiary to further the business interests of petitioner, and the subsidiary was actually so used. The sound business judgment exercised by petitioner in making such acquisition has been demonstrated by subsequent experience; the tremendous potentialities of the Palos Verdes lots has been proved. (Op. Br., pp. 24-25.)

Petitioner further proved that it had neither motive nor reason for attempting to find means of reducing income or excess profits taxes, and it did not do so. (Op. Br., pp. 26-28.) Petitioner was a small company without any history or prospects of large profits or high earning assets. Its sole war contract of any substance had been cancelled some two months prior to the acquisition of Palos Verdes and, thereupon, petitioner was faced with a huge loss. It had never received any other large contracts. Petitioner's total backlog of prime contracts on December 31, 1943, amounted to only \$850. It was not awarded any further war contracts of any size until the latter part of 1944. The fact is that petitioner was seeking profits possibilities and not tax reduction.

Petitioner's situation and acquisition did not come within the purpose, objective or intent of Section 129 of the Internal Revenue Code and that section is inapplicable. Respondent's discussion of Section 129 (Brief, pp. 21-23) omits all reference to the basic objective of the statute, that is, to discourage the practice of corporations *with large excess profits* from buying up tax loss companies. As stated in *Commodores Point Terminal Corp.* (1948), 11 T.C. 411, 415-416:

“The report of the Senate Committee on Finance stated that the objective of the section was ‘to prevent the distortion through tax avoidance of the de-

duction, credit, or allowance provision of the code, particularly those of the type represented by the recently developed practice of corporations *with large excess profits* (or the interests controlling such corporations) acquiring corporations with current, past, or prospective losses or deductions, deficits, or current or unused excess profits credits, for the purpose of reducing income and excess profits taxes. . . .” (Emphasis added.)

The same objective is recognized in the Regulations (26 CFR 39.192-3):

“(b) If the requisite acquisition and purpose exist, among the transactions within clause (1) of section 129(a) are the following:

“(1) A corporation (or the interest controlling such a corporation) *with large profits* acquires control of another corporation . . .

“(2) A corporation *with large profits* transfers the assets of each of its branches . . .

“(3) A corporation *with high earning assets* transfers them to a newly organized subsidiary . . .” (Emphasis added.)

It is indisputable that Section 129 was never intended to apply to an acquisition by a small company, such as petitioner, with a history of losses or small profits, with no immediate prospects of anything except further losses, and without any “high earning assets.” Nor can the requisite purpose of tax avoidance be found in such a situation in the absence of any evidence thereof.

Respondent also asserts that the question of purpose “is one of fact for the trial judge.” (Brief, p. 23.) The answers to this assertion are threefold:

First: The Tax Court did not undertake to find what petitioner's purpose was in acquiring its subsidiary. It merely "affirmed the Commissioner's determination." (Resp. Brief, p. 18.) Such evidentiary facts as were actually found support the contrary conclusion, that is, that the acquisition was not for tax avoidance. Thus, the Tax Court found that on November 25, 1943, Mr. Lane wrote a letter to the board of directors of petitioner outlining the business purposes for which Palos Verdes was to be used, and the authenticity and sincerity of the letter were not questioned. (Tr. pp. 67-72.)

Second: There was no basis for any finding (and none was made) that petitioner's principal purpose in making the acquisition was tax avoidance. Petitioner affirmatively established that business purposes motivated the acquisition and that it had no motive for avoiding taxes.

Third: Where, as here, it is the duty of the Court to draw from the facts an ultimate inference of purpose or intention and not to deal with a technical tax question, the Court of Appeals is as well equipped as the Tax Court and "for that reason the Tax Court decision calls for little more weight than its logic suggests." (*Gillette's Estate v. Commissioner* (1950, 9th Cir.), 182 F.2d 1010, 1015.) The only "logic" applied by the Tax Court was this (Tr. p. 79):

"In the instant case, petitioners do not and cannot deny that American Pipe acquired control of the corporate property of Palos Verdes, subsequent to the specified date, nor that, as an incident thereof, it stood to enjoy tax benefits not otherwise available to it. As above observed, petitioner denies, however, that the tax benefits were the principal consideration or motivating purpose behind the acquisition."

This is the same type of "logic" characterized as "faulty reasoning" in *Gillette's Estate*, *supra*, 182 F.2d 1010, 1015. The mere fact that petitioner ultimately gained a tax benefit does not show that its principal purpose was tax avoidance. Moreover, it is simply not true that petitioner necessarily stood to enjoy tax benefits by the acquisition. The fact is that, on the date of acquisition, petitioner was still negotiating with respect to the termination of the chemical warfare contract, and it appeared likely that petitioner would have no income at all in 1943. The final settlement on that contract resulted in a loss which practically wiped out petitioner's income for the year. Petitioner's backlog of \$850 in war contracts on December 31, 1943, certainly did not foreshadow much in the way of 1944 income, nor did the first six months of 1944. And if petitioner had been able to carry out its plans for Palos Verdes completely, the probability of paying additional income taxes was far from remote.

B. The presumption in favor of respondent's ruling has no probative force.

Petitioner having presented substantial evidence contrary to respondent's determination, the decision of the Tax Court could not be rested in whole or in part on that determination. (Decisions cited in our opening brief, pp. 48-49.)

C. The Tax Court could not disregard petitioner's undisputed evidence.

It was shown without contradiction that petitioner's business purposes in acquiring Palos Verdes were as set forth in Mr. Lane's letter of November 25, 1943 and that petitioner actually utilized Palos Verdes to carry out those

purposes so far as possible. It was established, further, that petitioner's inability to carry out the program completely was due to the peculiar redemption period provided in the interlocutory decree in the Palos Verdes tax suit, that such provisions were not known to petitioner at the time of the acquisition, that petitioner did not have the funds to pay the property taxes in a lump sum in the short period of time available, and that the County Assessor ruled that the taxes could not be paid in installments because of the unusual provisions of the decree. (Tr. pp. 405, 406, 453, 492-493.)

The business purposes of petitioner, therefore, were shown both by the direct and positive documentary evidence and also by the direct, positive and unimpeached testimony of petitioner's president. Under these circumstances, the Tax Court could not arbitrarily disregard petitioner's evidence.

(Foran v. Commissioner (1945, 5th Cir.), 165 F.2d 705, 707;

Wright-Bernet v. Commissioner (1949, 6th Cir.), 172 F.2d 343, 346;

Crude Oil Corp. v. Commissioner, supra, 161 F.2d 809, 810;

R. P. Farnsworth & Co. v. Commissioner (1953, 5th Cir.), 203 F.2d 490, 492.)

In order to sustain respondent's position, it would be necessary to hold not only that petitioner's uncontradicted evidence was wholly false, but that it also tended to prove *just the opposite*, particularly:

1. That the entire testimony of Mr. Lane as to the purposes for which and the means by which Palos Verdes

was acquired, and the purposes for which it was utilized, was not only entirely false, but that it tended to prove just the opposite—tax avoidance;

2. That Mr. Lane's letter of November 25th, setting forth the reasons why the acquisition would be beneficial to the business of petitioner, was not only false, but tended to prove just the opposite of its contents;

3. That the meeting and action of petitioner's board of directors on November 26th, including the resolution then adopted, was not only false, but also tended to prove just the opposite;

4. That Mr. Lane's computations and notes of December 2, 1943, in which he worked out the profit possibilities on the Palos Verdes lots, was not only false, but further tended to show quite the opposite;

5. That petitioner's development and use of Palos Verdes as a profitable subsidiary not only failed to show business purpose, but tended to show just the reverse—tax avoidance;

6. That the uncontradicted testimony of Archer, Lane and Towles as to the values of the Palos Verdes properties was not only false, but tended to show that they were worthless;

7. That the undisputed evidence as to petitioner's small profits and losses in the past, as to its loss on the chemical warfare contract, as to its small profit in 1943, and as to its \$850 backlog of war contracts on December 31, 1943, was not only false, but tended to show that petitioner had large past, present and prospective profits;

8. That the note from Mr. Lane to Kreiger of July 29, 1942 (Ex. 19; Tr. p. 349), stating the terms on which

Archer would come to work for petitioner, was not only false, but tended to prove that Archer became employed by petitioner for other reasons;

9. And that Archer's letter of May 25, 1943, to petitioner, whereby Archer attempted unsuccessfully to interest petitioner in investing in the Palos Verdes project (Ex. 6; Tr. pp. 161-162), was not only false, but had the effect of showing that petitioner was already acquiring Palos Verdes stock.

The vice of this type of reasoning was pointed out in *United States v. American Bell Telephone Co.* (1896), 167 U.S. 224, 259, 42 L.Ed. 144, 160-161, 17 S.Ct. 809:

"The difficulty with this charge of wrong is that it is not proved. It assumes the existence of a knowledge which no one had; of an intention which is not shown. It treats every written communication from the solicitor in charge of the application, calling for action, as a pretence, and all the oral and urgent appeals for promptness as in fact mere invitation to delay. It not only rejects the testimony which is given, both oral and written, as false, but asks that it be held to prove just the reverse."

V.

RESPONDENT CANNOT SUSTAIN THE DECISION ON OTHER GROUNDS.

Seeking to abandon completely the position assumed in his deficiency notice and in the Tax Court by now adopting some vague theory of "real economic loss," respondent argues that petitioner was not entitled to file consolidated tax returns regardless of Section 129 of the Internal Revenue Code. This theory is based upon the same fac-

tual distortions exposed above, that is, that petitioner “paid a premium for the stock of an unsuccessful, financially distressed corporation . . . in an attempt to offset the losses of the latter against its own profits and thereby avoid taxation” and that the real loss “was felt by the old stockholders of Palos Verdes who held the stock as the land declined in value to almost worthlessness.” (Brief, pp. 39, 41.)

This argument is unsound for these reasons:

1. Neither the deficiency notice nor the decision below was based on any such theory. The deficiency notice was made on the ground that petitioner acquired Palos Verdes for the principal purpose of avoiding taxes, that, therefore, Palos Verdes was not a member of an affiliated group of corporations within the intent of Section 141 of the Internal Revenue Code and that the privilege of filing consolidated returns was not within “the purview” of Section 141. (Tr. pp. 30-31.) No claim was made that the consolidated returns were or could be disallowed under Section 45 or on any other ground. Moreover, petitioner’s position in the Tax Court (Tr. pp. 110-111) and the decision therein (Tr. pp. 75-79) were both predicated solely upon the alleged applicability of Section 129, and respondent cannot sustain the decision on any other ground. (*Commissioner v. Chelsea Products, Inc.* (1952, 3rd Cir.), 197 F.2d 620, 624.)

2. As shown, petitioner did not pay a “premium” for the stock.

3. While Palos Verdes was in financial difficulty, its lands were far from worthless. The lots had values far in excess of the taxes assessed on them, and such values have been proved.

4. Petitioner did not acquire Palos Verdes for tax avoidance purposes, but for business reasons. At the time of acquisition, petitioner had no record of large past profits, it had but slight prospects of any profits in 1943, and it had no backlog of war contracts or other reason to anticipate future profits of any size. That petitioner would gain any tax advantage of any consequence could not have been foreseen.

5. There was nothing "fabricated" about the Palos Verdes losses. Respondent abandoned all dispute regarding the reality and amounts of such losses.

6. Such losses were sustained by Palos Verdes itself, there was no showing of any loss by any Palos Verdes' stockholder, and the losses were properly reported by Palos Verdes on its tax returns. Section 45 of the Internal Revenue Code is inapplicable. There is no problem of allocation of income or deductions between or among corporations. No question is raised as to any arbitrary or improper shifting of income or deductions from one corporation to another. (*Simon J. Murphy Co. v. Commissioner* (1956, 6th Cir.), 231 F.2d 639, 644.) The Commissioner cannot act under Section 45 where the income of the corporations is properly reflected on their respective books of account. (7 Mertens, Law of Federal Taxation, sec. 38.63, pp. 124-125.)

7. The decisions cited by respondent do not sustain his position. The decision in *Woolford Realty Co. v. Rose* (1931), 286 U.S. 319, 76 L.Ed. 1128, was not based upon any grounds of tax avoidance, but was made entirely on a strict construction of the statutory provisions regarding loss carry overs. (See comment, Barnard, Acquisitions

for Tax Benefit, 34 Cal.L.Rev. 36, 41-42.) Moreover, the subsidiary's loss during the year of its acquisition was allowed; carry overs of past losses only were disallowed.

Similarly, in *Ericsson Screw Machine Products Co.* (1950), 14 T.C. 757, it was held that a transactions was a sale of assets rather than a reorganization because it did not come within the terms or purposes of the statutory provisions concerning reorganizations.

In *J. D. & A. B. Spreckels Co.* (1940), 41 B.T.A. 370, the taxpayer acquired the stock of the subsidiary for \$1. There was no business purpose whatever for the acquisition, since the subsidiary was insolvent, it was not engaged in business, it had contracted to sell all its assets, there was nothing to show any intention of resuming business, and the subsidiary was subsequently dissolved. The soundness of the decision may be doubted (see, Barnard, Acquisitions for Tax Benefit, 34 Cal.L.Rev. 36, 43-44), but it does not assist respondent in any event. The decision was only that, in the absence of Section 129, a tax benefit could be disallowed only if tax avoidance was the *sole* purpose of the acquisition (this was respondent's position in the Tax Court here: Tr. pp. 110-111); hence, if the present case cannot be sustained under Section 129 (requiring only that the *principal* purpose be tax avoidance), then it certainly cannot be sustained under the *Spreckels* case.

8. Finally, the mere fact that a transaction eventually results in tax consequences unfavorable to the Government does not authorize respondent's determination. (See, *Simon J. Murphy Co. v. Commissioner*, *supra*, 231 F.2d 639, 645.) This Court cannot legislate disallowance of such tax benefits; it can only act judicially.

CONCLUSION.

It is respectfully submitted that respondent has failed to overcome any of the points raised in our opening brief. Here, as in the Tax Court, respondent seeks only to smear petitioner by the artful use of wholly unconnected matters, aided by the tortuous twisting of the facts to fit what is supposed to be a pattern of vaguely sinister events. We submit that no sincere effort has been made to show that the Tax Court's decision is justified by the findings or the evidence. The decision should be reversed for each of the reasons stated.

Dated, San Francisco, California,
December 28, 1956.

Respectfully submitted,

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No. 15,174

IN THE
United States Court of Appeals
For the Ninth Circuit

AMERICAN PIPE & STEEL CORPORATION,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING AND
PETITION FOR REHEARING IN BANC.

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PAUL P. O'BRIEN,

Index

	Page
Reasons why a rehearing should be granted	2
The question of fact involved has been decided by the Court of Appeals and not by the Tax Court	3
Comparison of the opinion of the Court of Appeals with the decision of the Tax Court	5
The Tax Court made no finding whatever of the purpose for which petitioner acquired Palos Verdes and the conclusions that respondent did not err or that petitioner has not carried its burden of proof will not sustain the decision	6
The statements of the Tax Court that the respondent did not err and that the petitioner did not sustain its burden of proof are conclusions of law and do not meet the requirement for findings of fact	6
The Court of Appeals is not empowered to weigh the evidence and make findings which the Tax Court failed to make. Its duty is to remand the case for further proceedings	10

Table of Authorities Cited

Cases

	Pages
Belridge Oil Co. v. Helvering (9th Cir.), 69 F. (2d) 432 ..	7, 9, 10
C.I.R. v. DeMille (9th Cir.), 90 F. (2d) 12	3
Diller v. C.I.R. (9th Cir.), 91 Fed. (2d) 194	7, 11
Doernbecher Mfg. Co. v. C.I.R. (9th Cir.), 80 F. (2d) 573 .	7
Gillette's Estate v. C.I.R. (9th Cir.), 182 Fed. (2d) 1010 ..	5
Harbor Plywood v. C.I.R. (9th Cir.), 143 F. (2d) 780	7
Helvering v. Nat'l Grocery Co., 304 U.S. 282	6, 11
Helvering v. Rankin, 295 U.S. 123	6, 7, 9, 10, 11
J. M. Perry Co. v. C.I.R. (9th Cir.), 120 F. (2d) 123	3
Kelley v. Everglades Drainage Dist., 319 U.S. 415	10
Norris v. Jackson, 9 Wall. 125	9
Regals Realty Co. v. C.I.R. (2nd Cir.), 127 P. (2d) 931 ...	3
Rubino v. C.I.R. (9th Cir.), 186 Fed. (2d) 304	3
U. S. v. Jefferson Electric Mfg. Co., 291 U.S. 386	8

Statutes

Internal Revenue Code:

Section 272(a)(1)	3
Section 1117(b)	5
Section 1141(a)	5

Texts

53 American Jurisprudence 787	8
89 Corpus Juris Secundum 487	8
Mertens, Law of Federal Income Taxation, Vol. 9:	
Section 50.93, pp. 334-6	6
Section 51.19, p. 396	11
Section 51.19, p. 403	5
Section 51.20, pp. 408-9	3

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*To the Honorable William E. Orr, James Alger Fee and
Stanley N. Barnes, Associate Justices of the United
States Court of Appeals for the Ninth Circuit:*

REASONS WHY A REHEARING SHOULD BE GRANTED.

1. In a case in which the decision of the Tax Court consists of nothing more than a recital of the testimony of the witnesses and the conclusion that the respondent had not erred, the Court of Appeals has undertaken to make the findings of fact which the Tax Court failed to make in order to affirm the decision.

2. The Court of Appeals is not empowered to make findings of fact.

3. The Tax Court does not comply with the statutory requirement for findings of fact by ruling that the respondent did not err.

*It must not be; there is no power in Venice
Can alter a decree established:
'Twill be recorded for a precedent;
And many an error by the same example
Will rush into the state.*

**THE QUESTION OF FACT INVOLVED HAS BEEN DECIDED BY
THE COURT OF APPEALS AND NOT BY THE TAX COURT.**

The Petition for Redetermination addressed to the Tax Court (I.R.C. §272(a)(1)) presented a question of fact which is stated in the opinion of the Tax Court as follows:

“Fundamentally, the question to be resolved is whether the principal purpose motivating American Pipe’s acquisition of Palos Verdes was the evasion or avoidance of income or excess profits taxes through obtaining thereby tax benefits otherwise unavailable to it within the proscription of section 129, Internal Revenue Code of 1939.” (Tr. 75-6.)

The question is simply a question of the purpose and intent of petitioner in its acquisition of Palos Verdes.

The question of whether a corporation is availed of for the purpose of tax advantage is a pure question of fact. *C.I.R. v. DeMille* (9th Cir.), 90 F. (2d) 12, cited and followed in *J. M. Perry Co. v. C.I.R.* (9th Cir.), 120 F. (2d) 123, 125; *Rubino v. C.I.R.* (9th Cir.), 186 Fed. (2d) 304. It is *not* a conclusion of law. *Regals Realty Co. v. C.I.R.* (2nd Cir.), 127 F. (2d) 931. See Mertens, Law of Federal Income Taxation, Vol. 9, §51.20, pp. 408-9.

The Tax Court omitted to find whether the principal purpose for which petitioner acquired Palos Verdes Estates was or was not the evasion or avoidance of income or excess profits taxes, and made no finding whatsoever of the purpose motivating petitioner’s acquisition of Palos Verdes. The issue—the question involved—was simply not decided by the Tax Court.

The “Findings of Fact and Opinion” of the Tax Court consist merely of a summary or recital of the evidence pre-

sented. Without indication of its belief or disbelief of any of the evidence, the Tax Court approved the determination of respondent with the conclusions that the evidence did not establish that the respondent erred and that the petitioner had not successfully carried its burden of proof. A comparison of the opinion filed with the published decision of the Tax Court (25 T.C. 351) graphically demonstrates that the Court of Appeals has assumed to bridge the gap and determine the ultimate fact for itself.

Comparison of the Opinion of the Court of Appeals with the Decision of the Tax Court.

Tax Court (25 T.C. 351).

"On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred in holding that the evasion or avoidance of income or excess profits taxes . . . was the principal purpose for which American Pipe acquired the capital stock of Palos Verdes."

And that:

"Although intent is a state of mind, it is none the less a fact to be found, . . . The Commissioner having determined that the tax benefit to be gained was the principal purpose behind the acquisition, it was petitioner's burden to prove that such determination was erroneous. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof. We have accordingly so found."

Court of Appeals.

"A close scrutiny of the reasons for the purchase of Palos Verdes reveals that any corporation formed to do business in the real estate field would have satisfied the alleged needs of American Pipe. *The reasons advanced by petitioner* that its acquisition of a practically defunct corporation was the potential value of the lots *does not overshadow the conclusion that the acquisition was for a huge potential tax benefit.*" (Italics ours.) Opinion, p. 5.

Clearly the result is an exchange of functions. The Court of Appeals had assumed the duty of the Tax Court to find the essential fact (I.R.C. §1117(b); *Gillette's Estate v. C.I.R.* (9th Cir.) 182 Fed. (2d) 1010); and the Tax Court has usurped the appellate function to determine whether a finding is "clearly erroneous." I.R.C. §1141(a). The Tax Court's function is not that of a court of review. Mertens, Law of Federal Income Taxation, Vol. 9, §51.19, p.

403; *Helvering v. Nat'l Grocery Co.*, 304 U.S. 282. The Court of Appeals is not empowered to make findings of fact. *Helvering v. Rankin*, 295 U.S. 123.

THE TAX COURT MADE NO FINDINGS WHATEVER OF THE PURPOSE FOR WHICH PETITIONER ACQUIRED PALOS VERDES AND THE CONCLUSIONS THAT RESPONDENT DID NOT ERR OR THAT PETITIONER HAS NOT CARRIED ITS BURDEN OF PROOF WILL NOT SUSTAIN THE DECISION.

The Tax Court made no finding and expressed no conclusion that the acquisition of Palos Verdes was for a potential tax benefit or that such purpose overshadowed the reasons advanced by petitioner. These are the findings of the Court of Appeals (ante p. 5). It is the duty of the Tax Court to find the facts upon which the validity of a proposed deficiency depends, since only its rulings of law are subject to review by the Appellate Court. If the Tax Court fails to find the facts, the case should be remanded with instructions. Mertens, *Law of Federal Income Taxation*, Vol. 9, §50.93, pp. 334-6; *Helvering v. Rankin*, 295 U.S. 123. Nowhere in the decision of the Tax Court is there any finding of the purpose for which Palos Verdes was acquired.

The Statements of the Tax Court that the Respondent Did Not Err and that the Petitioner Did Not Sustain Its Burden of Proof Are Conclusions of Law and Do Not Meet the Requirement for Findings of Fact.

“It is the duty of the Board of Tax Appeals to find the facts upon which the validity of the proposed deficiency tax depends. Upon the petition to review, we are concerned only with the question as to whether or

not the facts found sustain the legal conclusions deduced therefrom.

. . .

“All that we had said in this matter is for the purpose of emphasizing the fact that there is no direct finding by the Board of Tax Appeals on the ultimate fact involved in the determination of this appeal and, consequently, that the case must be returned to them for such a finding.” *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432 (cited and followed in *Helvering v. Rankin*, 295 U.S. 132).

The statement contained in the “Findings of Fact and Opinion” that the evidence does not establish that respondent erred is not a finding of fact but a conclusion of law and will not sustain the decision. *Diller v. C.I.R.* (9th Cir.), 91 Fed. (2d) 194; cf. *Doernbecher Mfg. Co. v. C.I.R.* (9th Cir.), 80 F. (2d) 573; *Harbor Plywood v. C.I.R.* (9th Cir.), 143 F. (2d) 780.

In *Diller v. C.I.R.*, ante, the finding held insufficient parallels the conclusion in the instant case. Compare:

Findings.

Diller case.

“From the facts before us, we are of the opinion that the contention of the respondent is correct . . .” [did not err.]

This case.

“On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred . . .”

In reversing and remanding the *Diller* case with instructions to make findings and render such decision thereupon as the facts may warrant, this Court says:

“These statements do not constitute findings by the Board. . . . A determination of these questions of fact was and is necessary to a decision of the case.

. . .

“The duty thus imposed on the Board [to make findings] cannot be assumed by this court. Our review of the Board’s decision is limited to questions of law. We are not authorized to make findings of fact.” 91 F. (2d) 194.

The statement that the petitioner has not carried its burden of proof is not a finding of fact and will not sustain the decision of the Tax Court. A finding that a party has or has not sustained the burden of proof as to a designated issue is a legal conclusion and not a finding of fact. 53 Am. Jur. 787; 89 C.J.S. 487; *U.S. v. Jefferson Electric Mfg. Co.*, 291 U.S. 386.

In *U.S. v. Jefferson Electric Mfg. Co.*, ante, the asserted finding again parallels the conclusion of the Tax Court in this case. Compare:

Findings.

Jefferson Electric case.

“As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof.”

This case.

“After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof. We have accordingly so found.”

The issue stated in the *Jefferson Electric* case was whether the taxes in question were paid entirely by the plaintiff and neither directly nor indirectly by the plaintiff’s purchasers. In reversing the decision of the District Court for insufficiency of the finding quoted, the Supreme Court says:

“Whether the special findings give the requisite support to the judgments rendered thereon is a different question and is one which is open to consideration

here. The findings are long and the view which we take of *one* of them makes it unnecessary to state the others. The one relates to the matter made essential by subdivision (a) (2) of section 424, and is the only finding on the subject.

. . .

“Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371 is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of differing opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it.” (291 U.S. 407-9.)

The duty of the Tax Court to make findings upon the question involved is a positive duty and is not fulfilled by the recital of probative facts. In *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432 (cited and followed in *Helvering v. Rankin*, 295 U.S. 132), this Court had occasion to declare:

“The ‘findings of fact’ of the Board of Tax Appeals are concerned largely with the recital of probative facts. There is no finding therein of the actual cash value of the option. It is only from the statements in the opinion and from the fact that judgment was entered for the respondent . . . that the actual cash value of the option is to be inferred.”

Compare:

Norris v. Jackson, 9 Wall. 125, 126:

“The findings required are not a mere report of the evidence but a statement of the ultimate facts on

which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest.”

Manifestly, the decision of the Tax Court does not meet or fulfill the requirement for findings of fact and does not merit the approval of this court. As a matter of fact, the expressions of this court at the argument of the case clearly indicated a majority, if not a unanimous, view that the case must be remanded and that no other action would be proper.

THE COURT OF APPEALS IS NOT EMPOWERED TO WEIGH THE EVIDENCE AND MAKE FINDINGS WHICH THE TAX COURT FAILED TO MAKE. ITS DUTY IS TO REMAND THE CASE FOR FURTHER PROCEEDINGS.

It is not the function of the Court of Appeals to search the record and analyze the evidence in order to supply findings which the trial court has failed to make. *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415. The rule is the same in cases from the Tax Court. *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432. In:

Helvering v. Rankin, 295 U.S. 123 at 131-2, the Supreme Court says:

“If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board (citing cases). And the same procedure is appropriate *even when the findings omitted by the Board might be supplied from examination of the record.*” (Italics ours.)

The review courts are without power on review of proceedings of the Tax Court to make any findings of fact. Mertens, Law of Federal Income Taxation, Vol. 9, §51.19, p. 396. To draw inferences, to weigh the evidence, and to declare the result is the function of the Tax Court. *Helvering v. National Grocery Co.*, 304 U.S. 271, 294. If the Tax Court fails to find the facts, the case must be remanded. *Diller v. C.I.R.* (9th Cir.) 91 F. (2d) 194; *Helvering v. Rankin*, 295 U.S. 123.

It is respectfully submitted:

1. That a rehearing should be granted to preserve uniformity of decision and to avert the confusion bound to ensue if the decision of the Tax Court is legitimized.
2. That the importance of the questions of judicial procedure involved merits a rehearing in banc.

Dated, San Francisco, California,

May 14, 1957.

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